SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 283

THE UNITED STATES, PETITIONER

vs.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. WAVERLY SMITH, ET AL., ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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(A) Supreme Court of the United States

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THE UNITED STATES, PETITIONER

v.

MAGNOLIA PETROLEUM COMPANY, A JOINT STOCK ASSOCIATION, E. R. BROWN, R. WAVERLY SMITH, E. E. PLUMLY, W. C. PROCTOR, COURTENAY MARSHALL, F. V. FAULKNER, A. C. ERIE, D. C. STEWART, B. H. STEPHENS, AND W. H. FRANCIS, TRUSTEES

Petition for writ of certiorari to the United States Court of Claims

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled cause February 14, 1927. On February 25, 1927, the defendant filed a motion for a new trial which, on March 7, 1927, was overruled by the court.

(B) STATEMENT

This case presents questions relating to the basis for calculating interest on refunds of income and excess profits taxes for 1916 and 1917, the principal one being as to the date from which interest should be computed. The refunds were allowed October 11, 1923, and the principal amounts thereof paid November 22, 1923. On those dates the revenue act of 1921 (c. 136, 42 Stat. 227) was in force. The Commissioner of Internal Revenue deferred the calculation of interest to a later date, and the amount of interest payable on the refunds was finally determined by him and paid in July, 1924, shortly after the passage of the revenue act of 1924 (c. 234, 43 Stat. 253; approved June 2, 1924). The revenue acts of 1921 and 1924 provided different bases for calculating the interest on refunds.

The act of 1921 provided that (42 Stat. 316):

(1) "If the tax was paid under a specific and detailed protest, or if the tax was paid as the result of an additional assessment, interest on the refund should be calculated from the date the tax was paid"; or

(2) "If no protest was made and the tax was not paid as the result of an additional assessment, the interest on the refund should be calculated from a date six months after the filing of claim for refund."

There were also provisions in the 1921 act which the United States claims contemplated no interest on refunds allowed by the commissioner on his own initiative and not on grounds assigned in the claim for refund.

(C) The 1924 act, on the other hand, provided (43 Stat. 346) that in all cases of refunds the interest should be computed from the dates the taxes were paid.

In the case at bar, the refund was allowed and the principal amount refundable was paid in 1923, when the 1921 act was in effect, and the United States contends that the right to interest became fixed at that time under the existing law, and was not altered by a delay in computing and paying the interest until after the passage of the act of 1924. The Court of Claims took the other view and allowed interest under the 1924 act from the date the tax had been paid.

If the 1921 act does apply, two further questions remain:

First. Were such protests as were filed when the taxes were paid sufficient to bring into operation that provision of the 1921 act allowing interest on refunds from date of payment of the tax, and

Second. Under sections 250, 252, and 1324(a) of the revenue act of 1921, was any interest payable on a refund allowed by the commissioner on his own motion and not on a ground assigned in the claim for refund?

(D) The United States contends that the protests were not sufficient and that such interest as is allowable should be computed as provided in the act of 1921 from a date six months after the claim for refund was filed, and that with respect to some items refunded on different grounds than those asserted in the claims, no interest at all was payable.

Suit was instituted by the Magnolia Petroleum Company in the Court of Claims to recover the sum of $365,964.54 alleged to be due for interest on refunds of income and excess profits taxes for the years 1916 and 1917.

It appears that on March 27, 1917, the Magnolia Petroleum Company filed its income tax returns for the calendar year 1916, indicating a tax liability of $806,079.86, which was paid June 14, 1917. On June 15, 1917, the plaintiff filed an amended return which indicated an additional tax of $9,772.86, which was paid August 7, 1917. Payments of these taxes were not made under protest. On June 17, 1918, plaintiff filed its second amended return for 1916, which indicated an overpayment of tax of $30,217.11. At the same time plaintiff filed a claim for the refund of that amount. On September 20, 1920, plaintiff filed a supplemental claim for refund of 1916 taxes in the sum of $114,565.44. Attached to this claim was a third amended return which indicated that the plaintiff's total tax for said year was $101,287.28.

(E) It further appears that on May 18, 1918, the plaintiff filed its income and excess profits tax returns for the year 1917. On May 27, 1918, plaintiff filed an amended return indicating a tax liability of $1,966,600.87, which was paid on June 15, 1918. Payment was accompanied by a protest alleging:

"The grounds, among others, of such protest and involuntary payment, are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corportion, joint-stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust, and without sanction in said act."

Thereafter plaintiff discovered error in its return and, accordingly, on January 28, 1919, filed a second amended return indicating an additional tax of $5,390.17. The additional tax was never paid. On June 12, 1920, plaintiff filed a claim for the refund of the $1,966,600.87 taxes theretofore paid. On September 20, 1920, plaintiff filed a supplemental claim for refund of the 1917 taxes in the sum of $1,005,519.42. Attached to this claim for refund was a third amended return for 1917, indicating a tax liability for that year in the sum of $961,081.45.

On October 8, 1923, the Commissioner of Internal Revenue notified the plaintiff that its claim for the refund of 1916 taxes in the sum of $114,565.44 would be allowed for $105,571.95, and that its claim for the refund of the 1917 taxes in the sum of $1,966,600.87 would be allowed in the sum of $1,131,075.86 and that its claim for the refund of taxes for said year in the sum of $1,005,519.42 would be rejected in full.

On November 22, 1923, plaintiff received certificates of overassessment and Treasury warrants for the sums of $105,571.95 and $1,131,075.86. By the certificates of overassessments plaintiff was notified "interest status will be determined as soon as necessary data can be assembled."

On January 18, 1924, plaintiff was advised:

"Section 1324(a) of the revenue act of 1921 authorizes the payment of interest on amounts refunded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim, that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed."

Plaintiff was also advised that upon the basis of the above, interest had been computed and amounted to $34,737.15. Interest was computed on $105,556.34 from April 26, 1921, six months after the

claim was filed, to October 11, 1923, the date of allowance, and on various amounts of the 1917 tax from six months after the claims were filed, to the date of allowance on October 11, 1923. Taxpayer was advised that if it took exception to the ruling, or desired a review, it might within thirty days file an appeal with a brief or memorandum in support thereof.

G On February 9, 1924, the commissioner advised the plaintiff that with reference to the protest against the payment of the 1917 tax that the protest was general in its terms and did not contain the required specific or detailed basis, and that therefore it was insufficient to require payment of interest from the date of the payment of the tax.

On July 2, 1924, the commissioner advised the plaintiff that its appeal had been considered, and that—

"In connection with the claim that interest should be paid upon the amounts refunded from the respective dates of payment of the taxes, you are informed that bureau files contain no copy of a specific protest with regard to the payment of the 1916 taxes, and it is held that the protest under which it is contended that the 1917 taxes were paid is not a specific protest setting forth in detail the basis of and reasons for such protest. The language used in the protest in question is general, and the taxpayer merely contends that the regulations and the method of applying the rates of tax are arbitrary and unjust, but no attempt was made to specify in what manner the regulations or the method of imposing the tax was improper. Such a general statement is not a sufficient protest within the meaning of section 1324–a of the revenue act of 1921.

"With respect to the contention that the claims filed, especially those attached to the third amended returns, covered the grounds upon which the refunds were made you are informed that a claim must set forth specifically the grounds upon which the refund is sought, and a claim covering certain items can not be subsequently amended to include others. After a careful review, it is held that the analysis of the allowance of claims included in bureau letter dated January 18, 1924, is correct, and that interest has been properly computed with respect to such part of the refunds attributable to the points raised by the taxpayer in the claims filed. The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes. Accordingly, the taxpayers' appeal was denied with respect to all points except the date upon which the claim for the refund of 1917 taxes was filed, as indicated above."

H It was discovered that an error had been made in the computation of interest on the 1916 refund and that interest should have been computed from March 20, 1921, instead of from April 26, 1921.

On July 21, 1924, the plaintiff received Treasury warrant for $35,369.05, dated July 18, 1924. Plaintiff indorsed the warrant without prejudice to institute a suit to recover the balance of interest claimed by the plaintiff and the warrant was paid.

Thereafter this suit was instituted. It was contended by plaintiff that section 1324(a) of the revenue act of 1921 was repealed by section 1019 of the revenue act of 1924, and that that section was in turn repealed by section 1116 of the revenue act of 1926, c. 27, 44 Stat. 9, 119, and that plaintiff was entitled to have interest computed under the last-mentioned section from the date of the payment of the taxes to October 11, 1923.

Judgment was ordered entered for the plaintiff in the sum of $365,799.42, being interest computed from the dates of payment of the taxes to October 11, 1923.

ASSIGNMENT OF ERROR

The Court of Claims erred:

1 First. In holding that the revenue act of 1924 was applicable to the calculation of the interest payable on the refund claims of 1916 and 1917 filed by plaintiff and allowed in certain sums October 11, 1923.

Second. In holding that the letter set forth in the court's special findings of fact V was a written specific protest which set forth in detail the basis of and reasons for such protest.

REASONS FOR GRANTING WRIT

The decision in the instant case affects thousands of cases; and while the amount involved can not be calculated in a definite sum, it will run into millions of dollars. The decision below is opposed to the established practice and rulings of the Bureau of Internal Revenue. It also seems that there is slight basis for the decision of the court below that although the refund was allowed and the principal paid when the 1921 act was in force and a cause of action for interest on the basis fixed by the 1921 act then arose and became a fixed liability of the United States, the right changed and an increased liability for interest resulted because the payment of the interest was deferred until the passage of the 1924 act.

For these reasons, it is respectfully submitted that this petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1927.

1 In Court of Claims of the United States

No. E–11

MAGNOLIA PETROLEUM COMPANY, A JOINT STOCK ASSOCIATION, E. R. BROWN, R. WAVERLY SMITH, E. E. PLUMLY, W. C. PROCTOR, COURTENAY MARSHALL, F. V. FAULKNER, A. C. EBIE, D. C. STEWART, B. H. STEPHENS, AND W. H. FRANCIS, TRUSTEES

vs.

THE UNITED STATES

I. *History of proceedings*

On January 6, 1925, the plaintiff filed its original petition, to which the defendant filed a general traverse on March 7, 1925.

On May 19, 1925, by leave of court, the plaintiff filed its amended petition.

On August 4, 1926, the plaintiff filed a motion suggesting death of John Sealy, former trustee, and for leave to continue cause in names of surviving trustees. Said motion was allowed by court August 11, 1926.

On August 11, 1926, by leave of court, the plaintiff filed its second amended petition.

Said second amended petition is as follows:

II. *Second amended petition. Filed Aug. 11, 1926*

To the honorable, the Chief Justice and the Judges of the Court of Claims:

Plaintiff is a joint stock association, organized on April 24, 1911, in the State of Texas, with its principal office in the city of Dallas in said State. The following individuals, each of whom is a citizen of the United States, constitute plaintiff's duly chosen board
2 of trustees; E. R. Brown, R. Waverley Smith, E. E. Plumly, W. C. Proctor, Courtenay Marshall, F. V. Faulkner, A. C. Ebie, D. C. Stewart, B. H. Stephens, and W. H. Francis.

I

On March 27, 1917, plaintiff duly filed with the collector of internal revenue at Austin, Texas, its return of income for the calendar year 1916 under the revenue act of 1916, approved September 8, 1916 (39 Stats. L. 756), which return indicated a tax liability of $206,079.86.

On June 14, 1917, plaintiff paid said tax to the collector of internal revenue as aforesaid.

On June 15, 1917, plaintiff filed with the aforesaid collector an amended income-tax return for the year 1916, which indicated an additional income tax for said year in the amount of $9,772.86,

which sum plaintiff paid to the said collector on August 7, 1917, pursuant to an additional assessment in said amount.

Thus plaintiff paid income taxes for the year 1916 in the total amount of $215,852.72. Plaintiff is unable to state and therefore does not make a positive averment in respect of whether or not the aforesaid payments were accompanied by protests, as it has been unable after diligent effort, to locate copy of any protest which accompanied these payments, but in this regard plaintiff states that on or about February 1, 1924, it received from the collector of internal revenue at Austin, Texas, a letter in words and figures as follows:

3

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
OFFICE OF THE COLLECTOR, FIRST DISTRICT OF TEXAS,
Austin, Texas, January 31, 1924.

MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

Attention Mr. Sinclair:

SIR: Reference is made to your personal visit to this office and to your telephone conversation concerning amount paid for 1916 as income tax.

You state that it is your opinion that the amount was paid under specific protest. I have made a very thorough search of the records of this office, but am unable to locate the protest or the copy thereof. It is presumed that if a protest was made that the same was left attached to the return for the year in question. It further appears from the list in this office that the amount was paid under protest.

Respectfully,

JAMES W. BASS, *Collector.*

Plaintiff calls upon the defendants for the production of the original protest as mentioned in the aforesaid letter and for full information in respect of all facts which justified the collector in making the aforesaid statement that the tax was paid under protest.

II

Thereafter, to wit, on June 17, 1918, plaintiff filed its second amended return for the year 1916, which indicated that plaintiff had overpaid its income tax for that year in the amount of $30,217.11, and plaintiff at the same time duly filed with the aforesaid collector a refund claim in said amount.

4

III

On September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue a supplemental claim for the refundment of income taxes for the year 1916 in the amount of $114,565.44, "or such greater amount as may be legally refundable." There was attached to such supplemental claim and made a part thereof, a third

amended income tax return for the year 1916, which indicated plaintiff's total tax liability for said year to be $101,287.28. The amount stated in the aforesaid supplemental claim, viz, $114,565.44, is the difference between the total amount of taxes which plaintiff had previously paid for said year, viz, $215,852.72, and the amount of tax due under the aforesaid third amended return.

IV

By letter dated October 8, 1923, signed by J. G. Bright, Deputy Commissioner of Internal Revenue, plaintiff was informed that "claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49," and that the claim for the refund of $30,217.11, hereinbefore mentioned, would be rejected in full. A true and correct copy of the aforesaid letter is attached hereto, made a part hereof and designated Exhibit A.

On November 19, 1923, plaintiff received through its counsel from the aforesaid J. G. Bright, Deputy Commissioner of Internal Revenue, a certificate of overassessment in respect of the year 1916, numbered 118905, and in the amount of $105,571.95. In the aforesaid certificate it is stated that "this overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the revised statutes as amended by section 1316 of the revenue act of 1921." Plaintiff was also informed by the aforesaid certificate of overassessment that "interest status will be determined as soon as necessary data can be assembled." A true and correct copy of the aforesaid certificate of overassessment is attached hereto, made a part hereof and designated Exhibit B.

The aforesaid certificate of overassessment was accompanied by treasury warrant payable to the order of plaintiff, by which $105,571.95 on account of income taxes for the year 1916 were refunded to plaintiff.

V

On May 18, 1918, plaintiff duly filed with the collector of internal revenue at Austin, Texas, its income and war excess profits tax return for the calendar year 1917 under the revenue act of 1916 as amended by the revenue act of 1917, approved October 3, 1917 (40 Stats. L. 300). Immediately thereafter, because of the settlement by the Bureau of Internal Revenue of the tax liability of plaintiff for the years 1912, 1913, and 1914, and consequent readjustment of invested capital, it became necessary to prepare an amended return for the year 1917 which plaintiff filed with the aforesaid collector of internal revenue on May 27, 1918. Such amended return indicated a total tax liability for the year 1917 in the amount of $1,966,600.87, which sum was paid by plaintiff to said collector on June 15, 1918, involuntarily, under duress and accompanied by a written, specific protest setting forth in detail the basis of and reasons for such

6 protest. A true and correct copy of said protest is attached hereto, made a part hereof and designated Exhibit C. Thereafter an error was discovered by plaintiff in the amount of interest received by it in the year 1917 and a second amended return containing a correction of such error and indicating additional tax for that year in the amount of $5,390.17, was filed with the aforesaid collector of internal revenue on January 28, 1919, but plaintiff never received notice of assessment or demand for such additional tax and plaintiff never paid such additional tax under said second amended return.

VI

On June 12, 1920, plaintiff duly filed with the aforesaid collector of internal revenue claim for the refundment of the aforesaid payment of $1,966,600.87.

Thereafter, to wit, on September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue a supplemental refund claim on account of the year 1917 for the sum of $1,005,519.42, "or such greater amount as may be legally refundable." There were attached to such claim and made a part thereof, third amended income and war excess profits tax returns for the calendar year 1917, which indicated a total income and war excess profits tax liability on the part of plaintiff for the year 1917 in the amount of $961,081.45. The amount of the aforesaid supplemental claim is the difference between the total amount of taxes which plaintiff had previously paid for said year, viz., $1,966,600.87, and the amount of tax due under the aforesaid third amended returns.

VII

7 By letter signed by Deputy Commissioner of Internal Revenue J. G. Bright, and bearing date October 8, 1923 (Exhibit A), plaintiff was informed that "the claim for refund of $1,966,600.87 income and profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01," and also that the claim for refund of $1,005,519.42, income and profits taxes for the year 1917, will be rejected in full.

On November 19, 1923, plaintiff received through its counsel from the aforesaid J. G. Bright, Deputy Commissioner of Internal Revenue, a certificate of overassessment in respect of the year 1917, No. 16,366, and in the amount of $1,131,075.86. In the aforesaid certificate it is stated that "This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the revenue act of 1921." Plaintiff was also informed by the aforesaid certificate of overassessment that "interests status will be determined as soon as necessary data can be assembled." A true and correct copy of the aforesaid certificate of overassessment is attached hereto, made a part hereof and designated Exhibit D.

The aforesaid certificate of overassessment was accompanied by treasury warrant payable to the order of plaintiff by which $1,131,075.86 on account of income and war excess profits taxes for the year 1917, were refunded to plaintiff.

VIII

The refundments, under refund claims as hereinbefore stated, of $105,571.95 for the year 1916, and $1,131,075.86 for the year 1917, were made by treasury warrant No. 368,611, payable to the order of the plaintiff in the amount of $1,236,647.81, which was
8 delivered to plaintiff's counsel on November 19, 1923. Shortly after the receipt of the hereinbefore mentioned certificates of overassessment and treasury warrant plaintiff, by its counsel, personally brought to the attention of the aforesaid J. G. Bright, Deputy Commissioner of Internal Revenue, the herveinbefore quoted statements made in the certificates of overassessment that interest status would be determined as soon as necessary data could be assembled and demanded of said J. G. Bright the immediate payment of interest upon the total of the refund as represented by the aforesaid treasury warrant from the date of the respective payments of the amounts refunded up to the date of the allowance of the respective refund claims. By letter dated January 18, 1924, and addressed to plaintiff's counsel, plaintiff was informed that the interest which would be allowed it on account of the refundment of taxes for the year 1916 amounted to $19,171.21, and that the interest which would be allowed it on account of the refundment of taxes for the year 1917 amounted to $15,565.94, or a total payment of interest of $34,737.15, and in such letter plaintiff was further informed that interest was allowable in the case of each of the aforesaid years from a date six months after each of the claims, which were subsequently allowed, was filed, and that interest was not allowable upon any amount refunded upon a ground other than that contained in the claims. Plaintiff in said letter was also informed, "If you take exception to the ruling made herein, or a review is desired, you may, within thirty days from the date of this letter, file an appeal, with a brief or memorandum in support thereof." A true and correct copy of the aforesaid letter is attached hereto, made a part hereof, and designated Exhibit E.

9 After the receipt of the aforesaid letter plaintiff by its counsel further discussed with the said J. G. Bright the matter of the payment of interest upon the refundment of taxes theretofore made to plaintiff. Under date of February 9, 1924, the said J. G. Bright wrote to plaintiff's counsel a letter in which it was stated that certain records in the Bureau of Internal Revenue failed to show that taxes paid by plaintiff for the year 1916 were paid under protest and further informing plaintiff that the written protest which accompanied its payment of taxes for the year 1917 was insufficient under the terms of section 1324 (a) of the revenue act of 1921. A true

and correct copy of the aforesaid letter dated February 9, 1924, is attached hereto, made a part hereof, and designated Exhibit F.

In accordance with the terms of the above mentioned letter dated January 18, 1924, and within an extension of time thereafter duly granted, plaintiff on February 23, 1924, filed with the Commissioner of Internal Revenue an appeal and printed brief in support of its claim for additional interest allowance. By letter bearing date July 2, 1924, addressed to plaintiff's counsel and signed by the aforesaid J. G. Bright, Deputy Commissioner of Internal Revenue, the position as hereinbefore stated of the Commissioner of Internal Revenue in respect of the additional allowance of interest was adhered to, but in said letter it was stated that the amount to be allowed as interest would be increased from $34,737.15 to $35,369.05, such increase being due solely to the fact that refund claim for the year 1917 was found by the commissioner to have been filed on September 20, 1920, instead of on October 26, 1920, as was indicated in the above mentioned letter from the aforesaid J. G. Bright to the
10 plaintiff bearing date January 18, 1924. A true and correct copy of the aforesaid letter, dated July 2, 1924, is attached hereto, made a part hereof, and designated Exhibit G.

The Commissioner of Internal Revenue has continuously thereafter declined and refused, and still declines and refuses, to pay to plaintiff interest on the aforesaid refunds in any amount in excess of $35,369.05.

IX

Thereafter, to wit, on or about the 21st day of July, 1924, plaintiff received Treasury warrant No. 463623, bearing date July 18, 1924, payable to the order of plaintiff, in the amount of $35,369.05, upon which plaintiff made an endorsement in manner shown by letter dated July 28, 1924, from the general attorney of the plaintiff to the Commissioner of Internal Revenue in words and figures as follows:

"COMMISSIONER OF INTERNAL REVENUE,

"*Treasury Department, Washington, D. C.*

"DEAR SIR: With reference to your letter of July 2nd this year addressed to Barry Mohun, Transportation Building, 17th and H Streets, NW., Washington, D. C., bearing initials IT:R:CC:ECW:

"We have received Treasury check #463623 dated July 18, 1924, for $35,369.05, indicated by you in your said letter to be the refundment of interest allowed on 1916 and 1917 taxes of this company. We deposited this check for collection and endorsed same as follows:

"'Endorsement of this warrant for interest on account of
11 refund of internal revenue taxes erroneously collected in the years 1916 and 1917 and the acceptance of the proceeds thereof are solely upon the condition that by doing so the Magnolia Petroleum Company in nowise waives, modifies, or restricts its rights to further claim in the Treasury Department and/or to institute suit in the courts for the recovery of the balance of interest which

said company claims it is entitled to under the law, as set forth in printed brief heretofore filed in the office of Commissioner of Internal Revenue on the 23d of February, 1924.'

"This information is being given to you in order that you may be fully apprised in the premises, as it is the intention of the company to file suit for the unrefunded balance claimed by the company to be due.

"Yours very truly,

W. H. FRANCIS."

The aforesaid Treasury warrant, in the amount of $85,369.05, was duly paid by the United States, endorsed in manner above set forth, and the proceeds thereof were accepted by the plaintiff solely upon the conditions as stated in said endorsement and in the aforesaid letter dated July 28, 1924.

X

Section 1324 (a) of the revenue act of 1921, approved November 23, 1921 (42 Stats. L. 227) provided as follows:

"That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate
12 of one-half of 1 per centum per month to the date of such allowance, as follows: (1) If such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part."

By section 1100 of the revenue act of 1924, approved June 2, 1924 (43 Stats. L. 253, 352), section 1324 of the revenue act of 1921 was repealed. Said repeal took effect as provided in the aforesaid section 1100 upon the "enactment" of the revenue act of 1924 which occurred on June 2, 1924.

Section 1019 of the revenue act of 1924 is as follows:

"Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term

"additional assessment" as used in this section means a
13 further assessment for a tax of the same character previously paid in part."

By section 1104 of the revenue act of 1924, section 1019 thereof took effect upon the "enactment" of said act which as shown occurred on June 2, 1924.

By section 1200 of the revenue act of 1926, approved February 26, 1926, section 1019 of the revenue act of 1924 was repealed. Said repeal took effect, as provided in the aforesaid section 1200, upon the enactment of the revenue act of 1926 which occurred on February 26, 1926.

Section 1116 of the revenue act of 1926 is as follows:

"(a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the revenue act of 1921, the revenue act of 1924, or this act, then to the date of the assessment of that amount.

"(b) As used in this section—

"(1) The term 'additional assessment' means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency under Title II or Title III of the revenue act of 1924 or of this act;

"(2) The term 'date of the allowance of the refund' means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

"(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this act, even though such refund or credit was allowed prior to such date."

XI

Plaintiff is advised by counsel, believes and therefore avers that because of the repeal of section 1324 of the revenue act of 1921 on June 2, 1924, the only provision of law in respect of the payment of interest upon refundments of taxes illegally collected which was in force on July 18, 1924, when interest was allowed to plaintiff by the Commissioner of Internal Revenue was section 1019 of the revenue act of 1924, and hence it was the duty of the Commissioner of Internal Revenue to pay to plaintiff interest on account of the aforesaid refundment of $1,236,647.81 in accordance with the terms of and command contained in the aforesaid section of the revenue act of 1924, i. e., from the respective dates of payment to the date of the

allowance of the refund, and that the failure and refusal of the Commissioner of Internal Revenue to pay to plaintiff interest in accordance with the terms of said section was unwarranted and not justified by any provision of law.

Plaintiff is further advised by counsel, believes and therefore avers that because of the repeal of section 1019 of the revenue act of 1924 on February 26, 1926, the only provision of law in respect of the payment of interest upon refundments of taxes illegally collected which is now in force is section 1116 of the revenue act of 1926 and hence it is the duty of the Commissioner of Internal Revenue to pay the plaintiff interest on account of the refundment to it of $1,236,647.81 on November 22, 1923, in accordance with the terms of and command contained in the aforesaid section of the revenue act of 1926, i. e., from the respective dates of payment to the date of the allowance of the refund, and that the failure and refusal of the Commissioner of Internal Revenue to pay to plaintiff interest in accordance with the terms of said section was unwarranted and not justified by any provision of law.

Plaintiff is further advised by counsel, believes and therefore avers that should it be held that interest should have been paid to plaintiff under the terms of section 1324 of the revenue act of 1921, it is entitled to receive on the amount of taxes refunded for the year 1916 interest at the rate of one-half of one per cent per month from
714 the date of payment of such tax, if the same were duly paid under protest, up to the date of the allowance of the claim and if such payment was not accompanied by such protest plaintiff is entitled to interest at said rate on $9,772.86 from the date of payment of the additional assessment of taxes for the year 1916 in that amount to the date of the allowance of the claim and on the balance of such refund for said year, viz., $95,799.09, plaintiff is entitled to interest at said rate from six months after claim was filed to the date that the claim was allowed, and that in respect of the year 1917 plaintiff is entitled to interest at said rate upon the tax refunded to plaintiff for said year, i. e., $1,131,075.86, from the date of the payment of the tax to the date of the allowance of the claim as hereinbefore set forth, since the payment was duly made under specific protest as required by subdivision (a) of section 1324 of the revenue act of 1921, and that the failure and refusal of the Commissioner of Internal Revenue to pay to plaintiff interest determined in the manner above set forth was unwarranted and not justified by any provision of law.

XII

Allowance of the respective refund claims for the years 1916 and 1917, as hereinbefore set forth, was made by the Commissioner of Internal Revenue on October 11, 1923, and is evidenced by the approval by the Commissioner of Internal Revenue on that date, of what is known as Schedule IT:A 7264.

XIII

Interest to which claimant is entitled as hereinbefore shown upon the respective claims, is as follows:

15

Year 1916:		
Interest on $105,571.95 at ½ of 1% per month from June 14, 1917, to October 11, 1923	$40,071.08	
Less interest paid plaintiff on July 21, 1924	19,171.21	
Net amount of interest to which claimant is entitled on account of year 1916		$20,899.87
Year 1917:		
Interest on $1,131,075.86 at ½ of 1% per month from June 15, 1918, to October 11, 1923	$361,262.51	
Less interest paid plaintiff on July 21, 1924	16,197.84	
Net amount of interest to which claimant is entitled on account of year 1917		345,064.67
Total		365,964.54

XIV

No action upon this claim, other than that hereinbefore set forth, has been taken before the Congress or any of the departments of the Government.

XV

Plaintiff and its trustees, respectively, have at all times borne true allegiance to the Government of the United States and have not in any way aided, abetted, or given encouragement to its enemies or aided in rebellion against the Government.

16

XVI

Plaintiff avers there is justly due and owing to it from the United States on account of the matters hereinbefore set forth, the sum of $365,964.54 after deducting all just set-offs and demands on the part of the United States; that it is the sole owner of the claim herein sued upon and that no assignment or transfer of the claim or any part thereof or any interest therein has been made.

Wherefore, plaintiff prays judgment against the United States for $365,964.54, with interest thereon from November 19, 1923.

Magnolia Petroleum Company, a joint stock association, E. R. Brown, R. Waverley Smith, E. E. Plumly, W. C. Proctor, Courtenay Marshall, F. V. Faulkner, A. C. Ebie, D. C. Stewart, B. H. Stephens, and W. H. Francis, trustees,

By BARRY MOHUN,
Attorney-in-Fact and Attorney of Record,
Transportation Building, Washington, D. C.

W. H. FRANCIS,
Dallas, Texas, of counsel.

[*Duly sworn to by Barry Mohun; jurat omitted in printing.*]

17-18 EXHIBIT A

Address reply to Commissioner of Internal Revenue and refer to IT:NR:G LWM-4.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Oct. 8, '23.

MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

SIRS: Your claims for refund of $30,217.11 and $114,565.44 income tax for 1916 and $1,005,519.42 and $1,966,600.87 income and excess profits taxes for 1917 have been examined and the results thereof are shown in the attached schedules.

The claims are based upon additional amounts claimed for depletion and depreciation for the years involved.

The claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49 and the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01. The claims for refund of $30,217.11 income taxes for 1916 and $1,005,519.42 income and profits taxes for the year 1917 will be rejected in full.

The rejection of the claims in the above amounts will appear officially in the next schedule to be approved by the commissioner.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Enclosures: Schedules 1 to 12.

19 EXHIBIT B

Treasury Department, Washington. Office of Commissioner of Internal Revenue, Income Tax Unit

IT:NR:G-LWM-4

CERTIFICATE OF OVERASSESSMENT

Number: 118905.
Allowed: $105,571.95.
Rejected: $

MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

SIRS: An audit of your income tax returns for 1916, Form 1031, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment (April, 1917; page 29, line 10)	$206,079.86
Additional assessment (June, 1917; page 6, line 20)	9,772.86
Total assessment	$215,852.72
Tax liability	110,280.77
Overassessment	105,571.95

The adjustments resulting in the above overassessment are fully outlined in schedules attached to a separate communication to you.

This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the revised statutes as amended by section 1316 of the revenue act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.

20 2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Interest status will be determined as soon as necessary data can be assembled.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By S. ALEXANDER,
Head of Division.

Schedule number: 7264.
District: 2nd Texas.
Amount abated: $
Amount credited: $
Year:
Account number: 6/176/20 4/17/29/10.
Amount refunded: $105,571.95.
Instructions executed, Oct. 30, 1923.

GEO. C. HOPKINS,
Collector Int. Rev.

21 EXHIBIT C

The Magnolia Petroleum Company hereby protests against the payment of income taxes which are alleged to be imposed by the act approved September 8, 1916, as amended by the act approved October 3, 1917, and the war income tax act embodied in said act approved October 3, 1917, and the war excess profits tax act embodied in said act approved October 3, 1917. The said company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid, by the company under protest, involuntarily and under duress in order to avoid the penalties as prescribed in said acts for non-

payment which the collector of internal revenue for this district states he will enforce against said company in the event payment is not made. The grounds, among others, of such protest and involuntary payment are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint-stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby, and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust, and without sanction in said act. The said company hereby formally notifies the said collector of internal revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them or either of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs.

MAGNOLIA PETROLEUM COMPANY,
By E. R. BROWN, *Vice President.*

[SEAL.]
Attest:
W. C. PROCTOR,
Assistant Secretary.

22 EXHIBIT D

Treasury Department, Washington. Office of Commissioner of Internal Revenue, Income Tax Unit

IT:NR:G-LWM-4

CERTIFICATE OF OVERASSESSMENT

Number: 16366.
Allowed: $1,131,075.86.
Rejected: $
MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

SIRS: An audit of your income tax return for 1917, Forms 1031 and 1063, and examination of related claims (if any) indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment (May, 1917, page 625, line 2)	$1,966,600.87
Tax liability	835,525.01
Overassessment	$1,131,075.86

The adjustments resulting in the above overassessment are fully explained in schedules attached to a separate communication to you.

This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the revenue act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.

23 2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Interest status will be determined as soon as necessary data can be assembled.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Schedule number: 7264.
District: 2nd Texas.
Amount abated: $
Amount credited: $
Year:
Account Number: 5/18/625/2.
Amount refunded: $1,131,075.86.
Instructions executed, Oct. 30, 1923.

GEO. C. HOPKINS,
Collector Int. Rev.

24 EXHIBIT E

TT:T:CC:ECW JANUARY 18, 1924.

MR. BARRY MOHUN,
Transportation Building,
17th and H Streets, Washington, D. C.

In re Magnolia Petroleum Company, Dallas, Texas

SIR: Reference is made to your personal request for the allowance of interest on amounts refunded to the above-named taxpayer for the years 1916 and 1917.

Bureau records show that certificate of overassessment No. 118905 was issued in the amount of $105,571.95 for 1916 and certificate of overassessment No. 16366 was issued in the amount of $1,131,075.86 for 1917 and both of such amounts were listed and allowed as refunds on Schedule IT:A7264.

Section 1324 (a) of the revenue act of 1921 authorizes the payment of interest on amounts refunded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim, that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount allowed other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed.

Examination discloses that allowance of claims were made as follows:

1916 TAXABLE YEAR

Amount of overassessment allowed upon the basis of the second amended return and claim dated June 6, 1918 (filed June 18, 1918), for the refund of $30,217.11	$22,360.22
Amount of overassessment allowed upon the basis of the third amended return and claim dated July 12, 1920 (filed September 20, 1920), for the refund of $114,565.44	82,853.32
Amount of overassessment allowed upon the basis of points not raised in claims	358.41
Total overassessment for 1916	$105,571.95

1917 TAXABLE YEAR

No part of the overassessment was allowed upon the basis of claim dated June 9, 1920, for the refund of $1,996,030.87.	
Amount of overassessment allowed upon the basis of third amended return for claim dated July 12, 1920 (filed October 26, 1920), for the refund of $1,005,519.42	$105,556.34
Amount of overassessment attributable to points not raised in claims	1,025,519.52
Total overassessment for 1917	$1,131,075.86

It, therefore, appears that interest is allowable as follows:

On $22,360.22 from December 18, 1918 (six months after the claim was filed) to October 11, 1923 (the date of allowance of the claim	$6,457.20
On $82,853.32 from March 20, 1921 (six months after the claim was filed), to October 11, 1923	12,714.01
Total interest due on refund for 1916	$19,171.21
On $105,556.34 from April 26, 1921 (six months after the claim was filed), to October 11, 1923 (the date of allowance)	15,565.94
Total interest due on refunds for 1916 and 1917	$34,737.15

If you take exception to the ruling made herein, or a review is desired, you may, within thirty days from the date of this letter, file an appeal, with a brief or memorandum in support thereof.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

EXHIBIT F

Address reply to Commissioner of Internal Revenue and refer to IT:R:CC:ECW.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 9, 1924.

MR. BARRY MOHUN,
Transportation Building,
17th & H Streets, Washington, D. C.

In re Magnolia Petroleum Co., Dallas, Texas

SIR: Reference is made to bureau letter dated January 18, 1924, upon the subject of interest payable under section 1324(a) of the

revenue act of 1921 to the above-named taxpayer on refunds of overpayments of taxes for the years 1916 and 1917.

In connection with your subsequent verbal statement to the effect that a larger amount of interest is payable than indicated in said letter, for the reason that in your opinion the taxes were paid under protest, you are informed that the returns filed for the year 1916 do not indicate that a protest of any character was submitted in connection with the payment for that year. The receipts heretofore filed with the bureau by the taxpayer for payments of $206,079.86 and $9,772.86, showing the "paid" stamp of the collector dated June 14, 1917, and August 7, 1917, respectively, do not bear any notation to the effect that these payments were made under protest.

With respect to the year 1917, the receipt heretofore filed with the bureau by the taxpayer for the payment of $1,966,600.87, showing the "paid" stamp of the collector dated June 29, 1918, contains a rubber-stamp impression "paid under protest." The files of the bureau contain a document marked "copy," a copy of which
28 is transmitted herewith. In this document it is stated that protest is made against the payment of taxes in the amount of $1,966,600.87. This protest was apparently filed with the first amended return for 1917, inasmuch as an office record copy of that return shows a tax liability in said amount. The essential part of the protest is as follows:

"The grounds among others of such protest and involuntary payment are that said acts are unconstitutional and void, and their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby; and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust and without the sanction in said act."

It will be noted that this protest is general in terms and does not contain a specific or detailed basis. Inasmuch as this document is not specific and does not set forth in detail the basis of and reasons for such protest, thus advising the Government specifically of the taxpayer's basis for alleging that the tax had been improperly assessed and collected, and further does not specify the basis upon which the refund for the year involved was made, it is held that such protest is insufficient under the terms and provisions of section 1324 (a) of the revenue act of 1921 to require the payment of interest

from the date of payment of the tax upon any part of the amount refunded for 1917.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

Enclosure.

29 EXHIBIT G

Address reply to Commissioner of Internal Revenue and refer to IT:R:CC:ECW.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 2, 1924.

Mr. BARRY MOHUN,
Transportation Building,
17th & H Streets N.W., Washington, D. C.

In re Magnolia Petroleum Co., Dallas, Texas

SIR: Reference is made to your letter dated February 23, 1924, transmitting an appeal to the commissioner from the conclusions reached by this office in connection with proposed allowances of interest on refunds of taxes overpaid for the years 1916 and 1917 by the above-named taxpayer.

Upon consideration of the appeal, it is held that interest is payable in the amounts indicated in the letter from this office dated January 18, 1924, except that in view of the fact that the claim for the refund of taxes paid for 1917 was apparently filed September 20, 1920 (instead of October 26, 1920, as indicated in said letter) interest is payable on $105,536.34 from March 20, 1920, six months after such date.

The interest found due, therefore, amounts to $19,171.21 on the refund of 1916 taxes, and $16,197.84 on the refund of 1917 taxes.

30 In connection with the claim that interest should be paid upon the amounts refunded from the respective dates of payment of the taxes, you are informed that bureau files contain no copy of a specific protest with regard to the payment of the 1916 taxes, and it is held that the protest under which it is contended that the 1917 taxes were paid is not a specific protest setting forth in detail the basis of and reasons for such protest. The language used in the protest in question is general, and the taxpayer merely contends that the regulations and the method of applying the rates of tax are arbitrary and unjust, but no attempt was made to specify in what manner the regulations or the method of imposing the tax was improper. Such a general statement is not a sufficient protest within the meaning of section 1324-a of the revenue act of 1921.

With respect to the contention that the claims filed, especially those attached to the third amended returns, covered the grounds upon which the refunds were made you are informed that a claim must set

forth specifically the grounds upon which the refund is sought, and a claim covering certain items cannot be subsequently amended to include others. After a careful review, it is held that the analysis of the allowance of claims included in bureau letter dated January 18, 1924, is correct, and that interest has been properly computed with respect to such part of the refunds attributable to the points raised by the taxpayer in the claims filed. The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes. Accordingly, the taxpayer's appeal was denied with respect to all points except the date upon which the claim for the refund of 1917 taxes was filed, as indicated above.

The interest found due will be scheduled for allowance and payment.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

31 III. *General traverse*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IV. *Argument and submission*

On January 13, 1927, this case was argued and submitted on merits by Mr. Barry Mohun, for the plaintiff, and by Mr. Alexander H. McCormick, for the defendant.

32 V. *Special findings of fact, conclusion of law, and opinion of the court by Moss, J. February 14, 1927*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Special findings of fact

I

Plaintiff is a joint-stock association, organized April 24, 1911, in the State of Texas, with its principal office in the city of Dallas, in said State. The following individuals, each of whom is a citizen of the United States, constitute plaintiff's duly chosen board of trustees: E. R. Brown, R. Waverley Smith, E. E. Plumly, W. C. Proctor, Courtenay Marshall, F. V. Faulkner, A. C. Ebie, D. C. Stewart, B. H. Stephens, and W. H. Francis. Plaintiff has always rendered its returns under the Federal taxing statutes on a calendar-year basis.

II

On March 27, 1917, plaintiff filed with the collector of internal revenue at Austin, Tex., its return of income for the calendar year 1916, under the revenue act of 1916, 39 Stat. 756, which return indicated a tax liability of $206,079.86. Plaintiff paid the aforesaid tax to the collector of internal revenue at Austin, Tex., on June 14, 1917.

On June 15, 1917, plaintiff filed with the aforesaid collector an amended income-tax return for the year 1916, which indicated an additional income tax for said year in the amount of $9,772.86. Thereafter the additional taxes shown by said amended return were the subject of an additional assessment, which was made by the Commissioner of Internal Revenue, of income taxes due by the plaintiff for the year 1916, and said additional income taxes in the amount of $9,772.86 were paid under the aforesaid additional assessment, and pursuant to notice of "additional assessment," by plaintiff to the collector of internal revenue at Austin, Tex., on August 7, 1917.

Thus the total income taxes paid by plaintiff for the year 1916 were in the amount of $215,852.72. Said taxes were not paid under protest.

33

III

On June 17, 1918, plaintiff duly filed with the aforesaid collector of internal revenue its second amended income tax return for the year 1916, which indicated that plaintiff had overpaid its income tax for that year in the amount of $30,217.11. The aforesaid second amended return showed changes and adjustments which resulted in additions to income on account of accrued earnings from some of the oil leases purchased by plaintiff from the McMan Oil Co. as of December 1, 1916, and there were deductions from income shown by said amended return on account of the purchase of the aforesaid leases because of depreciation and depletion both of properties acquired from the McMan Oil Co. and other properties. The said second amended return also contained adjustments of operating expenses, depreciation on property not used directly in the production of oil, and adjustments in respect of loss on sale of bonds below par. The aforesaid second amended return was attached to and made part of a claim for refund of $30,217.11, which claim for refund was duly filed by plaintiff with the Commissioner of Internal Revenue on June 17, 1918.

IV

On September 20, 1920, plaintiff filed with the collector of internal revenue at Dallas, Tex., a third amended return for the year 1916 which indicated plaintiff's tax liability for said year to be in the amount of $101,287.28. The aforesaid third amended return was attached to and made a part of a refund claim which was filed with

the collector of internal revenue at Dallas, Tex., on September 20, 1920, as aforesaid, and was for the refundment of $114,565.44 "or such greater amount as is legally refundable."

V

On May 18, 1918, plaintiff duly filed with the collector of internal revenue at Austin, Tex., its income and war excess profits tax returns for the calendar year 1917 under the revenue act of 1916 as amended by the revenue act of 1917, approved October 3, 1917. 40 Stat. 300. Immediately thereafter, because of the settlement by the Bureau of Internal Revenue of the tax liability of plaintiff for the years 1912, 1913, and 1914, and consequent readjustment of invested capital, it became necessary to prepare amended returns for the year 1917 which plaintiff filed with the aforesaid collector of internal revenue on May 27, 1918. The plaintiff's total tax liability shown by the aforesaid amended returns was $1,966,600.87, which was paid to the collector of internal revenue at Austin, Tex., on June 15, 1918. The payment was made involuntarily, under duress, and in order to avoid distraint proceedings by the collector against plaintiff's property and the payment of said taxes by plaintiff was accompanied by a written specific protest which set forth in detail the basis of and reasons for such protest. Such protest was in words and figures as follows:

"The Magnolia Petroleum Company hereby protests against the payment of income taxes which are alleged to be imposed by
34 the act approved September 8, 1916, as amended by the act approved October 3, 1917, and the war income-tax act embodied in said act approved October 3, 1917, and the war excess profits tax act embodied in said act approved October 3, 1917. The said company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid by the company under protest, involuntarily and under duress, in order to avoid the penalties as prescribed in said acts for nonpayment which the collector of internal revenue for this district states he will enforce against said company in the event payment is not made. The grounds, among others, of such protest and involuntary payments, are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint-stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust, and without sanction in said act. The said company hereby formally notifies the said collector of internal revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them on either

of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs.

"MAGNOLIA PETROLEUM COMPANY,
[SEAL.] "By E. R. BROWN, *Vice President.*
"Attest:
"W. C. PROCTOR,
"*Assistant Secretary.*"

Thereafter an error was discovered by plaintiff in the amount of interest received by it in the year 1917, and a second amended return containing a correction of such error and indicating additional tax for that year in the amount of $5,390.17, was filed with the aforesaid collector of internal revenue on January 28, 1919, but plaintiff never received notice of assessment or demand for such additional tax and plaintiff never paid such additional tax under said second amended return.

VI

On June 12, 1920, plaintiff duly filed with the aforesaid collector of internal revenue claim for the refundment of the aforesaid payment of $1,966,600.87. The reasons given in support of said claim were as follows:

"1. Said Magnolia Petroleum Company is a joint stock association organized by contract and not under any statute.

"2. That the payment of $1,966,600.87 was made involuntarily under duress and accompanied by formal written protest.

"3. Said amount was illegally and erroneously assessed and collected in that the statutes imposing the tax are ambiguous and uncertain in terms and are unconstitutional and void; and further, the regulations which have been attempted to be prescribed under said acts are not authorized thereby, and particularly the method of applying the rates of taxation, as is attempted in article 16 and in other articles of said regulations under Title II of the act approved October 3, 1917, is arbitrary and unjust and without sanction under said act.

"4. That the Magnolia Petroleum Company is not a corporation created under the law or laws of the United States or of any State, Territory, or District thereof, within the meaning of the definition of the terms "domestic" and "corporation," as used in section 200 of the war excess profits tax law of October 3, 1917.

"5. Under the terms of Treasury Decision 2956 defining 'discovery' this company is entitled to a refund of a large part of the aforesaid taxes, the exact amount of which is not known to the company at this time, but the subject is being thoroughly investigated, and as soon as the figures are definitely ascertained a proper showing in respect thereof will be made to the department in accordance with prescribed rules and regulations."

VI

Thereafter, to wit, on September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue another refund claim on account of the year 1917 for the sum of $1,005,519.42, "or such greater amount as is legally refundable." There were attached to such claim and made a part thereof, third amended income and excess-profits tax returns for the calendar year 1917, which indicated a total income and war excess-profits tax liability on the part of plaintiff for the year 1917 in the amount of $961,081.45.

VII

Shortly after plaintiff, on September 20, 1920, filed its aforesaid refund claims for the years 1916 and 1917 of which claims a third amended return for each of such years was made a part, plaintiff, by its proper representatives actively negotiated with officials of the Bureau of Internal Revenue to secure settlement of its taxes for the years 1916 and 1917 and refunds of overpayments which it had made for said years.

VIII

Plaintiff furnished to the proper representatives of the Bureau of Internal Revenue all necessary facts and data in support of its refund claims theretofore filed for the years 1916 and 1917 and in a manner acceptable to the officials of said bureau and in accordance with its rules and regulations.

IX

Under date of October 8, 1923, the Commissioner of Internal Revenue advised plaintiff in respect of its refund claims for the years 1916 and 1917 as follows:

"Your claims for refund of $30,217.11 and $114,565.44 income tax for 1916 and $1,005,519.42 and $1,966,600.87 income and excess profits taxes for 1917 have been examined, and the results thereof are shown in the attached schedules.

36 "The claims are based upon additional amounts claimed for depletion and depreciation for the years involved.

"The claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49, and the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01. The claims for refund of $30,217.11 income taxes for 1916 and $1,005,519.42 income and profits taxes for the year 1917 will be rejected in full.

"The rejection of the claims in the above amounts will appear officially in the next schedule to be approved by the commissioner."

X

The Commissioner of Internal Revenue upon facts duly furnished him by plaintiff with its refund claims, or separately, and upon facts agreed upon, allowed plaintiff's refund claims on October 11, 1923, as follows:

"Year 1916, claim filed September 20, 1920, for 114,565.44, allowed for $105,571.95.

"Year 1917, claim filed June 12, 1920, for $1,966,600.87, allowed for $1,131,075.86."

XI

Thereafter, on November 22, 1923, plaintiff received from the Commissioner of Internal Revenue certificate of overassessment in respect of the year 1916, bearing number 118905 and in the amount of $105,571.95. Such certificate of overassessment is in words and figures as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
INCOME TAX UNIT,
Washington.

IT:NR:G-LWM-4.
Certificate of overassessment.
Number: 118905.
Allowed: $105,571.95.
Rejected: $
MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

SIRS: An audit of your income tax returns for 1916, Form 1031, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment (April, 1917; page 29, line 10)	$206,079.66
Additional assessment (June, 1917; page 6, line 20)	9,772.86
Total assessment	215,852.72
Tax liability	110,280.77
Overassessment	105,571.95

The adjustments resulting in the above overassessment are fully outlined in schedules attached to a separate communication to you.

37 This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the revenue act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by a check of the Treasury Department, forwarded herewith.

Interest status will be determined as soon as necessary data can be assembled.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Schedule number: 7264.
District: 2d Texas.
Amount abated: $
Amount credited: $
Year:
Account number: 6/176/20 4/17/29/10.
Amount refunded: $105,571.95.
Instructions executed, Oct. 30, 1923.

GEO. C. HOPKINS,
Collector Int. Rev.

The above certificate of overassessment was accompanied by Treasury warrant payable to the order of plaintiff by which $105,571.95 on account of income taxes for the year 1916 were refunded to plaintiff.

XII

On November 22, 1923, claimant received from the Commissioner of Internal Revenue certificate of overassessment in respect of the year 1917, bearing No. 16366, and in the amount of $1,131,075.86. Such certificate of overassessment is in words and figures as follows:

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
INCOME TAX UNIT,
TREASURY DEPARTMENT,
Washington.

IT:NR:G-LWM-4.
Certificate of overassessment.
Number: 16366.
Allowed: $1,131,075.86.
Rejected: $

MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

SIRS: An audit of your income-tax return for 1917, Forms 1031 and 1103, and examination of related claims (if any), indicates
38 that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment (May, 1917, page 625, line 2)	$1,966,600.87
Tax liability	835,525.01
Overassessment	1,131,075.86

The adjustments resulting in the above overassessment are fully explained in schedules attached to a separate communication to you.

This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the revenue act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department forwarded herewith.

Interest status will be determined as soon as necessary data can be assembled.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Schedule number: 7264.
District: 2d Texas.
Amount abated: $
Amount credited: $
Year:
Account number: 5/18/625/2.
Amount refunded: $1,131,075.86.
Instructions executed, Oct. 30, 1923.

GEO. C. HOPKINS,
Collector Int. Rev.

The above certificate of overassessment was accompanied by Treasury warrant payable to the order of plaintiff by which $1,131,075.86 on account of income and excess profits taxes for the year 1917 were refunded to plaintiff.

XIII

The two aforesaid certificates of overassessment for the years 1916 and 1917 were accompanied by Treasury warrant payable to the order of the plaintiff in the sum of $1,236,647.81, which represented refundment of income taxes for the year 1916 in the amount of $105,571.95 and of income and excess profits taxes for the year 1917 in the amount of $1,131,075.86.

Thereafter, to wit, under date of January 18, 1924, the Commissioner of Internal Revenue wrote to plaintiff's counsel in respect of interest on the aforesaid refundments as follows:

39 "Reference is made to your personal request for the allowance of interest on amounts refunded to the above-named taxpayer for the years 1916 and 1917.

"Bureau records show that certificate of overassessment No 118905 was issued in the amount of $105,571.95 for 1916 and certificate of overassessment No. 16366 was issued in the amount of $1,131,075.86 for 1917 and both of such amounts were listed and allowed as refunds on Schedule IT: A 7264.

"Section 1324 (a) of the revenue act of 1921 authorizes the payment of interest on amounts refunded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount allowed other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed.

"Examination discloses that allowance of claims were made as follows:

1916 TAXABLE YEAR

Amount of overassessment allowed upon the basis of the second amended return and claim dated June 6, 1918 (filed June 18, 1918), for the refund of $30,217.11	$22,360.22
Amount of overassessment allowed upon the basis of the third amended return and claim dated July 12, 1920 (filed September 20, 1920), for the refund of $114,565.44	82,853.32
Amount of overassessment allowed upon the basis of points not raised in claims	358.41
Total overassessment for 1916	105,571.95

1917 TAXABLE YEAR

No part of the overassessment was allowed on the basis of claim dated June 9, 1920, for the refund of $1,900,000.87.	
Amount of overassessment allowed upon the basis of third amended return for claim dated July 12, 1920 (filed October 26, 1920), for the refund of $1,605,519.42	105,556.84
Amount of overassessment attributable to points not raised in claims	1,025,519.52
Total overassessment for 1917	1,131,075.86

It therefore appears that interest is allowable as follows:

On $22,360.22 from December 18, 1918 (six months after the claim was filed), to October 11, 1923 (the date of allowance of the claim)	96,457.20
On $82,853.32 from March 20, 1921 (six months after the claim was filed), to October 11, 1923	12,714.01
Total interest due on refund for 1916	19,171.21
On $105,556.84 from April 26, 1921 (six months after the claim was filed), to October 11, 1923 (the date of allowance)	15,565.94
Total interest due on refunds for 1916 and 1917	34,737.15

"If you take exception to the ruling made herein, or a review is desired, you may, within thirty days from the date of this letter, file an appeal, with a brief or memorandum in support thereof."

XV

Under date of February 9, 1924, the Commissioner of Internal Revenue addressed a communication to plaintiff through its counsel as follows:

"Reference is made to bureau letter dated January 18, 1924, upon the subject of interest payable under section 1324(a) of the revenue act of 1921 to the above-named taxpayer on refunds of overpayments of taxes for the years 1916 and 1917.

"In connection with your subsequent verbal statement to the effect that a larger amount of interest is payable than indicated in said letter, for the reason that in your opinion the taxes were paid under protest, you are informed that the returns filed for the year 1916 do not indicate that a protest of any character was submitted in connection with the payment for that year. The receipts heretofore filed with the bureau by the taxpayer for payments of $206,079.86 and $9,772.86 showing the 'paid' stamp of the collector dated June 14, 1917, and August 7, 1917, respectively, do not bear any notation to the effect that these payments were made under protest.

"With respect to the year 1917, the receipt heretofore filed with the bureau by the taxpayer for the payment of $1,966,600.87 showing the 'paid' stamp of the collector dated June 29, 1918, contains a rubber-stamp impression 'paid under protest.' The files of the bureau contain a document marked 'copy,' a copy of which is transmitted herewith. In this document it is stated that protest is made against the payment of taxes in the amount of $1,966,600.87. This protest was apparently filed with the first amended return for 1917, inasmuch as an office record copy of that return shows a tax liability in said amount. The essential part of the protest is as follows:

"'The grounds among others of such protest and involuntary payment are that said acts are unconstitutional and void, and their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint-stock company, or association, or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust, and without the sanction of said act.'"

It will be noted that this protest is general in terms and does not contain a specific or detailed basis. Inasmuch as this document is not specific and does not set forth in detail the basis of and reasons for such protest, thus advising the Government specifically of the taxpayer's basis for alleging that the tax had been improperly assessed and collected, and further does not specify the basis upon

which the refund for the year involved was made, it is held that such protest is insufficient under the terms and provisions of section 1324(a) of the revenue act of 1921, to require the payment of interest from the date of payment of the tax upon any part of the amount refunded for 1917.

41 XVI

Under date of July 2, 1924, the Commissioner of Internal Revenue addressed a communication to plaintiff through its counsel as follows:

"Reference is made to your letter dated February 23, 1924, transmitting an appeal to the commissioner from the conclusions reached by this office in connection with proposed allowances of interest on refunds of taxes overpaid for the years 1916 and 1917 by the above-named taxpayer.

"Upon consideration of the appeal, it is held that interest is payable in the amounts indicated in the letter from this office dated January 18, 1924, except that in view of the fact that the claim for the refund of taxes paid for 1917 was apparently filed September 20, 1920 (instead of October 26, 1920, as indicated in said letter), interest is payable on $105,556.34 from March 20, 1920, six months after such date.

"The interest found due, therefore, amounts to $19,171.21 on the refund of 1916 taxes, and $16,197.84 on the refund of 1917 taxes.

"In connection with the claim that interst should be paid upon the amounts refunded from the respective dates of payment of the taxes, you are informed that bureau files contain no copy of a specific protest with regard to the payment of the 1916 taxes, and it is held that the protest under which it is contended that the 1917 taxes were paid is not a specific protest setting forth in detail the basis of and reason for such protest. The language used in the protest in question is general, and the taxpayer merely contends that the regulations and the method of applying the rates of tax are arbitrary and unjust, but no attempt was made to specify in what manner the regulations or the method of imposing the tax was improper. Such a general statement is not a sufficient protest within the meaning of section 1324-a of the revenue act of 1921.

"With respect to the contention that the claims filed, especially those attached to the third amended returns, covered the grounds upon which the refunds were made you are informed that a claim must set forth specifically the grounds upon which the refund is sought, and a claim covering certain items can not be subsequently amended to include others. After a careful review, it is held that the analysis of the allowance of claims included in bureau letter dated January 18, 1924, is correct, and that interest has been properly computed with respect to such part of the refunds attributable to the points raised by the taxpayer in the claims filed. The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes. Accordingly, the taxpayer's appeal was denied with respect to all

points except the date upon which the claim for the refund of 1917 taxes was filed, as indicated above.

"The interest found due will be scheduled for allowance and payment."

XVII

On the 21st day of July, 1924, plaintiff received Treasury warrant payable to its order bearing date July 18, 1924, in the amount of $35,369.05. There accompanied said Treasury warrant notice
42 of interest allowance for the years 1916 and 1917. The notice of interest allowance for the year 1916 was in words and figures as follows:

TREASURY DEPARTMENT,
INTERNAL REVENUE BUREAU,
Washington, D. C.

Received July 21, 1924. H. M. M.
Form No. 7782.
Form approved by Comptroller General U. S. March 21, 1922.

NOTICE OF INTEREST ALLOWANCE

49734.

Claim No. 118905: District 2-Texas: Date of (schedule) allowance October 11, 1923. Schedule I. T. A-7264 item IT:Ad:R:CC: ECW.

MAGNOLIA PETROLEUM CO.,
Dallas Texas.

SIRS: Reference is made to your claim filed in connection with an overpayment of corporation income tax erroneously or illegally collected for the year 1916, which has been allowed by the refund of $105,371.95 credit of $

Under sec. 1324(a) of the revenue act of 1921, interest in the amount of $19,171.21 is payable on $22,360.22 from December 18, 1918, and on $85,853.32 from March 20, 1921 (six months after the date of filing claim), to October 11, 1923 (the date of allowance of the claim). No interest is allowable on the balance because that portion of the refund was not allowed on the basis of claims.

A check by the disbursing clerk of the department for the amount of such interest is inclosed herewith.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

The notice of interest allowance for the year 1917 was in words and figures as follows:

TREASURY DEPARTMENT,
INTERNAL REVENUE BUREAU,
Washington.

Received July 21, 1924. H. M. M.
Form No. 7782.
Approved by Comptroller General U. S. March 21, 1922.

NOTICE OF INTEREST ALLOWANCE

Claim No. 128432: District 2-Texas: Date of (schedule) allowance October 11, 1923. Schedule I. T. A.-7264; item IT:AD:R:CC: ECW.
Received July 21, 1924. G. L. J.

MAGNOLIA PETROLEUM CO.,
Dallas Texas.

SIRS: Reference is made to your claim filed in connection with an overpayment of corporation income tax erroneously or illegally collected for the year 1917, which has been allowed by the refund of $1,131,075.86 credit of $
43 Under sec. 1324(a) of the revenue act of 1921, interest in the amount of $16,197.84 is payable on $105,556.34 from March 20, 1921 (six months after date claim was filed), to October 11, 1923 (the date of allowance of the claim). No interest is allowable on the balance as that portion of the refund was not allowed on the basis of the claim.

A check by the disbursing clerk of the department for the amount of such interest in inclosed herewith.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

XVIII

Plaintiff made an indorsement on the back of the aforesaid Treasury warrant in the amount of $35,369.05 as follows:

"Indorsement of this warrant for interest on account of refund of internal revenue taxes erroneously collected in the years 1916 and 1917 and the acceptance of the proceeds thereof are solely upon the condition that by doing so the Magnolia Petroleum Company in nowise waives, modifies, or restricts its rights to further claim in the Treasury Department and/or to institute suit in the courts for the recovery of the balance of interest which said company claims it is entitled to under the law, as set forth in printed brief heretofore filed in the office of Commissioner of Internal Revenue on the 23d of February, 1924."

The above-mentioned warrant was paid by the United States bearing the above indorsement thereon.

XIX

"Regulations No. 33 (revised) governing the collection of the income tax imposed by the act of September 8, 1916, as amended by act of October 3, 1917," promulgated January 2, 1918, were vague and ambiguous, especially in reference to depletion, inventories, and depreciation so that it was impossible for plaintiff when it filed its first amended return on May 27, 1918, to correctly calculate the amount

of depletion and depreciation deductions to which plaintiff was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

XX

It had been for many years the consistent practice of the Bureau of Internal Revenue, where claims were filed within the statutory period, for taxpayers to amend their claims by asserting new grounds for refund and such amendments were accepted regardless of whether the statutory period within which claim might have been filed had expired or not. However, the amount claimed could not, under such practice, be increased by amendment. This unbroken practice of the bureau continued until partially modified by the action of the Commissioner of Internal Revenue by his letter to plaintiff, dated
44 January 18, 1924, and also partially modified by Law Opinion 1116, issued May 26, 1924, Internal Revenue Cumulative Bulletin III–1, page 350.

XXI

The Commissioner of Internal Revenue declined and refused and still declines and refuses to pay to plaintiff interest upon the refund of $1,236,647.81 made on November 22, 1923, in excess of the interest which he paid plaintiff thereon on July 18, 1924, in the amount of $35,369.05.

XXII

No action upon this claim, other than that hereinbefore set forth, has been taken before the Congress or any of the departments of the Government.

Conclusion of law

Upon the foregoing special findings of fact, which are included in the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover interest at the rate of 6 per cent per annum to October 11, 1923, on $95,799.09 from June 14, 1917, on $9,272.86 from August 7, 1917, and on $1,131,075.86 from June 15, 1918, less $35,369.05 paid to the plaintiff July 18, 1924, which leaves the amount of recovery $365,799.42.

It is therefore adjudged and ordered that the plaintiff have and recover of and from the United States the sum of three hundred sixty-five thousand, seven hundred ninety-nine dollars and forty-two cents ($365,799.42).

Opinion

Moss, Judge, delivered the opinion of the court:

On June 17, 1918, plaintiff, the Magnolia Petroleum Co., filed a claim for a refund of income taxes paid for the year 1916 in the sum of $30,217.11. On September 20, 1920, it filed a supplemental claim for the refund of taxes for the same year in the sum of $114,565.44 "or such greater amount as may be refundable." On June 12, 1920, plaintiff filed claim for the refund of $1,966,600.87 paid on account of its income tax for the year 1917, and on September 20, 1920, it filed a supplemental refund claim on account of the same year for the sum of $1,005,519.42, "or such greater amount as may be legally refundable." On October 8, 1923, plaintiff's claim for the refund of $114,565.44 for the year 1916 was allowed for $105,571.95 and was rejected for the sum of $8,993.49; the claim for the refund of $30,217.11 for the same year was rejected in full; the claim for the refund of $1,966,600.87 on account of the 1917 taxes was allowed for $1,131,075.86, and was rejected for $835,525.01; and the claim for $1,005,519.42 for the same year was rejected in full. On November 19, 1923, plaintiff received certificates of overassessment in respect of the year 1916 in the amount of $105,571.95, and for the year 1917 in the sum of $1,131,075.86, and these certificates were accompanied by Treasury warrants for the total amount, $1,236,647.81. The letter of the Commissioner of Internal Revenue transmitting the payments contained the statement "interest status will be determined as soon as necessary data can be assembled."

43 After certain negotiations between plaintiff and representatives of the Internal Revenue Bureau on the question of interest plaintiff was allowed, and there was paid to it, the sum of $19,171.21 on the refund for 1916 and $16,197.84 on the refund of 1917, a total of $35,369.05 on the refund of $1,236,647.81.

Plaintiff contends that it was entitled to receive the sum of $365,964.54 as interest on the allowance of refund. This suit is for the recovery of that amount.

The right of taxpayers to receive interest on amounts refunded as illegal or erroneous collections was first recognized and provided for by section 1324(a) of the revenue act of 1921, approved November 23, 1921 (42 Stat. 227), which reads as follows:

"That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) If such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment from the time such additional tax was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment from six months after the date of filing such claim for refund or credit.

The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

By the same act section 177 of the Judicial Code was amended to read as follows:

"No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the revenue act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or any sum which was excessive or in any manner wrongfully collected under the internal revenue laws."

The above act was followed by the revenue act of 1924, approved June 2, 1924, 43 Stat. 253, section 1019 of which contains the following provision:

"Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part." (43 Stat. 346.)

46 By the act of 1924, section 177 of the Judicial Code as amended was reenacted without change.

By the terms of section 1116 of the revenue act of 1926, 44 Stat. 119, the essential provisions of the act of 1924 were reenacted.

It is the contention of the Government that the applicable statutes for the determination of this case are sections 250(b), 252, and 1324(a) of the act of 1921.

Section 250(b) of that act, 42 Stat. 264, reads as follows:

"As soon as practicable after the return is filed the commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

Section 252, 42 Stat. 268, provides—

"That if upon the examination of any return * * * it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war profits, or excess-profits tax, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer * * *."

These two sections have no connection whatever with a claim for refund, but are intended to relate to mistake in overpayment by the taxpayer appearing on the face of the return itself, discoverable by the examination provided for in section 250(b), directing the proper credit of such excess payment to taxes due by the taxpayer under any other return, "and any balance of such excess shall be *immediately* refunded to the taxpayer." They are based upon the correct theory that in the event of an overpayment of taxes by mistake, immediately discovered and corrected, the taxpayer should not be entitled to interest. But that is not the case here. In 1918 plaintiff filed claims for refund. These claims were pending and under investigation for five years or more when the commissioner made an allowance of refund amounting in the aggregate to $1,236,647.81, but denied interest on certain items included in the total amount refunded on the ground as stated in a letter to plaintiff, that "interest is not allowable upon any amount allowed, other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act without reference to a claim having been filed."

In the enactment of the various statutes on the subject it must have been the general purpose of Congress to save the taxpayer from whom taxes have been illegally or erroneously collected from all loss by paying interest on the amount refunded during the whole time the money was illegally retained by the Government. No interest is provided under section 252, for the simple reason that the excess payment is immediately refunded, and there is consequently no loss to the taxpayer.

47 Such a situation is in no sense analogous to the case of a taxpayer whose excess payment was retained by the Government for more than five years and was finally discovered in an investigation resulting from the filing of a formal claim for refund.

It is, however, the opinion of the court that the allowance of interest in this case is controlled by the revenue act of 1924. Under this view of the case it will not be necessary to determine the question as to the sufficiency of the protest filed with the payment of the 1917 taxes.

Except in certain particulars not important to the question involved the act of 1924 became effective upon its enactment, the necessary effect of which was to repeal section 1324(a) of the act of 1921. Section 1019 of the act of 1924 eliminated the hard provisions of the earlier act. Under its terms the allowance of interest was not

made to depend on the filing and the allowance of a formal claim, nor does it require that the tax shall be paid under protest. It provided, without restriction or condition, for the allowance of interest on amounts refunded at the rate of 6 per cent per annum to the date of the allowance of the refund. It was not amendatory, in a strict sense, of the act of 1921. It was a substitution of the latter statute for the former, and it was effective on and after June 2, 1924. The final determination and allowance and also the payment of interest occurred after the act of 1924 became effective, at which time the sole existing provision of law for the payment of interest on refunds was that contained in section 1019 of the act of 1924.

It is therefore the opinion of the court that plaintiff is entitled to interest at the rate of 6 per cent per annum on the whole amount of the refund as calculated in the findings herein, amounting to the sum of $365,799.42, and it is so ordered.

Graham, judge; Hay, judge; Booth, judge; and Campbell, chief justice, concur.

48 VI. *Judgment. February 14, 1927*

At a Court of Claims held in the city of Washington on the fourteenth day of February, A. D., 1927, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do adjudge and order that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of three hundred sixty-five thousand seven hundred ninety-nine dollars and forty-two cents ($365,799.42.)

VII. *Proceedings after judgment*

On February 25, 1927, the defendant filed a motion for a new trial.

On March 7, 1927, the court entered the following order on said motion:

ORDER

It is ordered by the court this 7th day of March, 1927, that the defendant's motion for new trial be and the same is overruled.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

(Indorsed on cover:) File No. 32735. Court of Claims. Term No. 283. The United States, petitioner, vs. Magnolia Petroleum Company, E. R. Brown, R. Waverly Smith, et al., etc. Petition for writ of certiorari and exhibit thereto. Filed June 6th, 1927. File No. 32735.

Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1927

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 283

THE UNITED STATES, PETITIONER

v.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. Waverly Smith, et al., etc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION

OPINION BELOW

The opinion of the Court of Claims (R. 37) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered February 14, 1927. (R. 40.) A motion for a new trial was entertained and was overruled on March 7, 1927. (R. 40.) The petition for certiorari was filed June 6, 1927. The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The principal question is whether interest on refunds of taxes should be computed on the basis prescribed by the Revenue Act of 1921, or on that prescribed by the Revenue Act of 1924, where the refund was allowed and the principal paid while the 1921 Act was in effect but the computation and payment of the interest was delayed until after the passage of the 1924 Act.

THE STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 316 (see U. S. C., Title 28, Sec. 284) provides:

> **Interest on Refunds and Judgments**
>
> SEC. 1324(a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional

assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

(b) Section 177 of the Judicial Code is amended to read as follows:

"SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws."

The Revenue Act of 1924, c. 234, 43 Stat. 253, 346 (see U. S. C., Title 26, Sec. 153), provides as follows:

Interest on Refunds and Credits

SEC. 1019. Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the

due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

STATEMENT

This case presents a dispute over the basis for computing interest on refunds of taxes for the years 1916 and 1917. The refunds were allowed in October, 1923 (R. 27), and in November, 1923, certificates of overassessment in respect of the years 1916 and 1917 were issued to the taxpayer, and in that month the principal amount of the refunds was paid in full. The letters of the Commissioner of Internal Revenue transmitting the payments contained the statement "interest status will be determined as soon as necessary data can be assembled." (R. 28–31.)

The Revenue Act of 1924, which changed the basis for computing interest, was passed June 2, 1924. On January 18, 1924, the Commissioner of Internal Revenue notified the plaintiff that interest had been allowed in the sum of $34,737.15, computed in accordance with Section 1324 of the Revenue Act of 1921, then in force. (R. 31.) Owing to differences with the taxpayer respecting the interest matter, final determination of the interest was not made until July, 1924, and on the 21st day of July, 1924,

the taxpayer was paid $35,369.05, the amount of interest determined by the Commissioner to be owing under the provisions of the 1921 Act. (R. 34.) The 1921 Act makes a distinction between cases where a specific protest was made at the time of payment of the tax and cases where no protest was made. The taxes for the year 1916 were not paid under protest. (R. 24.) The taxes for the year 1917 were paid, accompanied by a protest, as follows (R. 25):

> The Magnolia Petroleum Company hereby protests against the payment of income taxes which are alleged to be imposed by the act approved September 8, 1916, as amended by the act approved October 3, 1917, and the war income-tax act embodied in said act approved October 3, 1917, and the war excess profits tax act embodied in said act approved October 3, 1917. The said company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid by the company under protest, involuntarily and under duress, in order to avoid the penalties as prescribed in said acts for nonpayment which the collector of internal revenue for this district states he will enforce against said company in the event payment is not made. The grounds, among others, of such protest and involuntary payments, are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum

> Company is not a corporation, joint-stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust, and without sanction in said act.

The Court of Claims found that this protest was general in terms and not specific or detailed (R. 32), and that the protest did not specify the basis on which the refund for the year 1917 was afterwards claimed and made (R. 32–33).

The Court of Claims held that it was immaterial that no protest accompanied the payment of the 1916 tax, or that the protest accompanying the payment of the 1917 tax was insufficient, because, although the refund was allowed and the principal paid before the enactment of the 1924 Act, the interest was not finally determined and paid until after the passage of that Act, and under the 1924 Act interest was to be computed from the date of payment of the tax regardless of whether a protest was filed.

A more detailed statement of the facts, and the specification of errors will be found in the petition for certiorari. (R. 1.)

ARGUMENT

THE BASIS FOR COMPUTING THE INTEREST ON THE REFUND IS THAT PRESCRIBED IN THE REVENUE ACT OF 1921, WHICH WAS IN FORCE WHEN THE REFUND WAS ALLOWED AND THE PRINCIPAL PAID. THE ENACTMENT OF THE 1924 ACT BEFORE THE INTEREST WAS COMPUTED AND PAID DID NOT OPERATE TO CHANGE THE BASIS FOR COMPUTING THE INTEREST

The Revenue Act of 1924 provides that interest on refunds shall be computed from the date the tax was paid.

The Revenue Act of 1921 provides that the interest shall be computed from the time when the tax was paid if the tax was paid "under a specified protest setting forth in detail the basis of and the reasons for such protest," but if not paid under protest or pursuant to an additional assessment, interest is computed from a date six months after the date of filing claim for refund. The rate is the same in either case.

In the case at bar the 1916 tax was paid without any accompanying protest, and the payment of the 1917 tax was accompanied by a protest which was general and not specific and which did not specify any ground on which the refund was ultimately claimed and paid. The Court of Claims allowed interest computed from the dates of payment of the taxes for each year on the theory that the 1924 Act was applicable. If the 1921 Act was applicable, obviously interest was computed from the wrong

date and the amount allowed by the Court of Claims was too much. The refunds were allowed in October, 1923, and the principal amount of the refunds was paid to the taxpayer in November, 1923, the matter of interest on the refunds being reserved for later determination. The interest was not finally ascertained and paid until after the Revenue Act of 1924 was enacted.

Upon the allowance of the refund the taxpayer immediately became entitled to the allowance and payment of interest. The right to interest arose at the time of the allowance of the refund and is to be determined by the law in force at that time. A cause of action for interest on the basis fixed by the 1921 Act arose at the time the refunds were allowed, and then became a fixed liability of the United States, and there is nothing whatever to support the decision of the Court of Claims that this right was changed and increased liability for interest resulted because payment of the interest on the refund was delayed until after the 1924 Act became effective. There is nothing whatever in the Act of 1924 to indicate that it was the intention of Congress that on a claim for refund allowed and the principal of which was paid before its passage interest should be computed on any different basis than that fixed by law at the time the claim was allowed.

CONCLUSION

The decision in this case controls a large number of cases pending in the Bureau of Internal Revenue

involving very large sums, and is opposed to the established practice and rulings of the Bureau. There seems to be no basis for the decision of the court below that although the refund was allowed and the principal paid when the 1921 Act was in force, and the right to interest thus became fixed, that right was changed and an increased liability for interest resulted because the payment of the interest was deferred until after the passage of the 1924 Act.

It is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted.

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JUNE, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 283

THE UNITED STATES, PETITIONER,

v.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. Waverly Smith, et al., etc.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 37) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered February 14, 1927. (R. 40.) A motion for a new trial was entertained and denied on March 7, 1927. (R. 40.) The petition for certiorari was filed June 6, 1927 (R. 40), and allowed October 17, 1927 (R. 41). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

The Revenue Act of 1921 provided that interest on refunds of taxes should be computed from a date six months after filing claim for refund, unless payment of the tax was made under specific protest, in which case interest was to be computed from date of payment.

The Revenue Act of 1924 provided that in all cases interest should be computed from date of payment of the tax.

The principal question is whether interest on refund of taxes for 1916 and 1917 should be computed on the basis prescribed by the Revenue Act of 1921 or on that prescribed by the Revenue Act of 1924, where the refund was allowed and the principal paid while the 1921 Act was in effect but the computation and payment of interest was delayed until after the passage of the 1924 Act.

If the 1921 Act be held to apply, then a further question arises and that is whether the protest filed when the tax for 1917 was paid was sufficient to bring into operation as to the refund of taxes for 1917 that provision of the 1921 Act allowing interest on refunds from the date of payment of taxes.

STATUTES INVOLVED

Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316, provides:

> "That upon the allowance of a claim for the refund of (or credit for) internal revenue taxes paid, interest shall be allowed and

paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

The Revenue Act of 1924, in Section 1019, c. 234, 43 Stat. 253, 346 (U. S. C., Title 26, Sec. 153), provides:

> Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against

which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

The material parts of Section 1100 of the Revenue Act of 1924 (43 Stat. 352, 353; U. S. C., Title 26, Secs. 1260, 1261) are:

(a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

* * * * *

(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1921

repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

(c) The repeal of Title II and Title IV of the Revenue Act of 1921 shall not be construed to take away the retroactive benefits allowed by paragraph (12) of subdivision (a) of section 214 or paragraph (14) of subdivision (a) of section 234, of the Revenue Act of 1921, or by section 401 or 403 of such Act.

STATEMENT

This case presents a question as to the date from which interest should be computed on refunds of income and excess profits taxes for 1916 and 1917. At the time the refunds were allowed and the principal amounts thereof paid the Revenue Act of 1921 was in force. At the time interest on the refunds was finally computed and paid the Revenue Act of 1924 was in force. The two Acts provide a different basis for calculating interest on refunds, although the rate of interest is the same in both Acts. The Act of 1924 provides that interest on refunds shall be computed in all cases from the date the taxes were paid. The Act of 1921 provides that interest shall be computed from the date the taxes were paid if paid "under a specific protest setting forth in detail the basis of and reasons for such protest," but if not paid under protest or pursuant to an additional assessment,

interest on the refund shall be computed from a date six months after the filing of the claim for refund. In this case no protest of any kind was made when the 1916 tax was paid, and the United States claims that the protest made on payment of the 1917 tax was insufficient. The United States contends that the 1921 Act applies and that in accordance with the provisions of Section 1324(a) thereof, interest was properly computed by the Commissioner of Internal Revenue from a date six months after the filing of the claim for refund. On the other hand, respondent contends and the Court of Claims held, that the 1924 Act applies and that, in accordance with the provisions of Section 1019 thereof, respondent is entitled to interest computed from the date the taxes were paid.

The facts are set forth in great detail in the findings of the court below. Those essential to a decision of the question as to which Act applies may be summarized as follows: On original and amended returns for the year 1916, filed March 27, 1917, and June 15, 1917, respectively, respondent, a joint stock association, paid *without protest* a total income tax of $215,852.72. Thereafter, on June 17, 1918, a second amended return for the same year, indicating an overpayment of $30,217.11, was filed, accompanied by a claim for refund in that amount. Subsequently, on September 20, 1920, a third amended return for 1916, indicating a tax liability of $101,287.28, was filed, accompanied by a claim

for a refund of $114,565.44 or "such greater amount as is legally refundable." (R. 24–25.)

Original and amended income and excess profits tax returns for the year 1917 were filed by respondent on May 18, 1918, and May 27, 1918, respectively, indicating a liability of $1,966,600.87, which amount respondent paid on June 15, 1918, *under protest,* a copy of which is set forth in the findings (R. 25), and which does not appear to state any ground on which refund was finally allowed (R. 31). Thereafter, on January 28, 1919, a second amended return for 1917 was filed, indicating an additional tax liability of $5,390.17, which was never assessed or paid. On June 12, 1920, respondent filed a claim for refund of the total amount paid for 1917. Subsequently, on September 20, 1920, a third amended return, indicating a total 1917 liability of $961,081.45, was filed, accompanied by a claim for refund in the amount of $1,005,519.42 or "such greater amount as is legally refundable." (R. 25–27.)

In due course the Commissioner of Internal Revenue acted on the various claims for refund, and on October 8, 1923, notified respondent that such claims would be allowed in the sum of $105,571.95, for the year 1916, and in the sum of $1,131,075.86 for the year 1917. (R. 31.) On October 11, 1923, the claims were actually allowed by the Commissioner in these amounts. On November 22, 1923, separate certificates of overassessment, accompanied by Treasury warrants in the amounts al-

lowed, were received by respondent. Each included a statement that "interest status will be determined as soon as necessary data can be assembled." (R. 27–30.)

On January 18, 1924, the Commissioner advised respondent of the determination of the amount of interest due upon the refunded amounts. As a result of respondent's exception to the amount thereof, the Commissioner addressed to him another letter, dated February 9, 1924, overruling his claim for additional interest. Respondent appealed from the Commissioner's conclusions. These events all occurred prior to the passage on June 2, 1924, of the 1924 Revenue Act. After the passage of that Act and on July 2, 1924, the Commissioner finally advised respondent that interest was payable in the amounts indicated in his letter of January 18, 1924, except that by reason of an error as to the date of the claim for refund of 1917 taxes the interest thereon began to run from an earlier date. Accordingly, on July 18, 1924, Treasury warrant was issued in the sum of $35,369.05, representing an interest allowance of $19,171.21 on the refund of 1916 taxes and $16,197.84 on the refund of 1917 taxes. Respondent indorsed this warrant without prejudice to the institution of suit for the recovery of additional amounts of interest theretofore claimed in its printed brief filed with the Commisioner on February 23, 1924. Subsequently this suit was instituted for the recovery of $365,799.42 additional

interest. (R. 30–36.) The Court of Claims gave judgment for this amount (R. 40), on the theory that Section 1019 of the 1924 Act, rather than Section 1324 (a) of the 1921 Act, applied.

Other facts bearing on the determination of the subsidiary question, whether the protest made on payment of 1917 taxes was sufficient under the 1921 Act to start interest running from the date of payment, are dealt with in the branch of the argument herein treating of that question, and in order to avoid repetition they will not be duplicated at this point.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Revenue Act of 1924 prescribed the method of calculation of interest payable on the refunds of 1916 and 1917 taxes allowed in 1923.

2. In finding that the payment of the 1917 tax was accompanied by a specific protest sufficient to make interest on the refund run from the date of payment of the tax.

SUMMARY OF ARGUMENT

The United States contends that the statute in effect at the time of the allowance of the claim for refund determined the basis for the calculation of interest thereon. At the time the refund was allowed in this case the Revenue Act of 1921 was in force. The rights of the parties then became fixed.

The fact that the interest thereon was not computed and paid until after the passage on June 2, 1924, of the Revenue Act of 1924 does not operate to give respondent the benefit of the more liberal basis provided in that Act for the calculation of interest on such refunds. In dealing with interest on refunds, the Act of 1924 is entirely prospective in operation. It applies only to refunds allowed after its passage. A retroactive interpretation of a revenue law is always to be avoided. This position of the United States accords with the decisions of this Court in *Girard Trust Company* v. *United States*, 270 U. S. 163; *Blair* v. *Birkenstock*, 271 U. S. 348; *Texas & Pacific Ry.* v. *Anderson*, 149 U. S. 237.

If, as respondent contends, the 1924 Act repealed, as to interest on refunds allowed prior to its passage, the provisions of the 1921 Act, so as to take away the right to interest under the Act of 1921, it left the respondent without any right to interest. The better view is that the right to interest which became fixed by the allowance of the refund while the 1921 Act was in effect was not divested or changed by the 1924 Act or by repeal of the 1921 Act.

If this Court concludes that the 1921 Act applies, the remaining question is whether the protest filed with payment of the 1917 tax was sufficient. It was general in its terms and stated no ground for refund which the findings identify as forming a basis for the allowance of the refund. The allowance of re-

fund for 1917 was in part on grounds not raised either in the protest or claim for refund, and in part on grounds first raised in a third amended claim for refund. Under these circumstances the protest was not sufficient under the 1921 Act to entitle the taxpayer to interest from date of payment of the tax.

ARGUMENT

I

THE BASIS FOR COMPUTING THE INTEREST ON THE REFUND IS THAT PRESCRIBED BY THE REVENUE ACT OF 1921, WHICH WAS IN FORCE WHEN THE REFUND WAS ALLOWED AND THE PRINCIPAL PAID. THE ENACTMENT OF THE 1924 ACT BEFORE THE INTEREST WAS COMPUTED AND PAID DID NOT OPERATE TO CHANGE THE BASIS FOR COMPUTING THE INTEREST

This Court, in *Girard Trust Company* v. *United States*, 270 U. S. 163, held that the date of the allowance of the refund within the meaning of Section 1324 (a) of the Revenue Act of 1921 is the date of final approval by the Commissioner of Internal Revenue of the amount to be refunded. In the case at bar the findings of the court below show that the Commissioner finally approved the refund on October 11, 1923. (R. 28.) Upon the approval on that date respondent's right to interest became fixed in accordance with the law then in force, which was the Revenue Act of 1921. The mere fact that the computation of the interest upon this fixed liability was not made until after the passage of Section 1019 of the Revenue Act of 1924 is of no importance.

There is no indication in the 1924 Act that Congress intended Section 1019 thereof to have a retroactive effect on refunds allowed prior to its passage. The Act provides that "*upon the allowance* of a * * * refund * * * interest *shall be allowed* and paid * * * from the date such tax * * * was paid." (Italics ours.) This clearly refers to allowances of refunds made after the passage of the Act.

The respondent contends that the Act of 1924 repealed the provisions of the 1921 Act, fixing the basis for allowance of interest on refunds. In Section 1100 of the Act of 1924 it was provided:

> The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c) * * * Sections * * * 1324 * * *.

Subdivisions (b) and (c) provide that certain portions of the Act of 1921 which are repealed shall remain in effect for the assessment and collection of taxes and for "the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes," and it may be contended that the interest referred to in this saving clause is interest owing to the Government and not to the taxpayer, but the obvious purpose of Congress was to preserve the operation of the 1921 Act on tax cases determined while it was in force. The words in

the repealing provisions of Section 1100 of the Act of 1924 that the repeal is "to take effect * * * upon the enactment of this Act" were surplusage, if they did not mean that the repeal should not be effective as to rights becoming fixed prior to the passage of the 1924 Act.

In any event, if the 1924 Act repealed the provision for interest on refunds allowed while the 1921 Act was in effect, it did not substitute the provisions of the 1924 Act in respect of such refunds. It is clear that the provisions for the allowance of interest on refunds contained in the 1924 Act only operated prospectively on allowances of refunds made after its passage, and if, as contended by the respondent, the provisions of the 1921 Act respecting interest on refunds allowed while it was in effect were wiped out completely by the 1924 Act, the result would be that the respondent was not entitled to any interest because the repeal took place before the interest was paid. Of course, we do not contend for that, because the repealing provisions of the 1924 Act should not be construed to divest a right to interest in favor of the respondent or remove the liability therefor of the Government which became fixed and definite upon the allowance of the refund while the 1921 Act was in effect.

In *Steamship Company* v. *Joliffe*, 2 Wall. 450, where a statute giving a pilot the right to half-pilotage fees on tender and refusal of his services, had been repealed after the services were tendered but

before the fees were collected or paid, the Court said (p. 457):

> When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.

See also *Twenty per Cent. Cases*, 20 Wall., 179, 187.

A retroactive construction of a Revenue Act is always to be avoided. *Blodgett* v. *Holden*, No. 154, October Term, 1927, decided November 21, 1927; *Nichols* v. *Coolidge*, No. 88, October Term, 1926, decided May 31, 1927 (47 Sup. Ct. Rep. 710); *Shwab* v. *Doyle*, 258 U. S. 529.

The contention that the Revenue Act in effect at the time of the allowance of the claim for refund is the Act to be applied for the purpose of computing interest is also in harmony with the decision of this Court in *Blair* v. *Birkenstock*, 271 U. S. 348, in which it was held that where a claim for refund was allowed subsequent to the taking effect

of the 1924 Act the allowance of interest must be in accordance with the provisions of that Act.

In a different connection but embodying the same principle this Court in *Texas & Pacific Railway* v. *Anderson*, 149 U. S. 237, held that where a judgment had been rendered which included interest at the rate fixed by the laws of Texas at the time of the rendition thereof, and while the case was pending on appeal the laws of Texas were changed providing for a different rate of interest, the rate prevailing at the time of the entry of the judgment was the proper rate, unaffected by the change in the statute, the change in such law in that respect operating only prospectively.

The position of the United States in this case is likewise in accord with the rule established by numerous decisions of this Court that interest is not to be allowed against the United States except where there is clear statutory authority therefor. *United States* v. *Sherman*, 98 U. S. 565, 567; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *New York*, 160 U. S. 598, 619. In the absence of a clear expression of legislative intent to effect such purpose, which is the case here, it would depart from that principle to hold that the more liberal allowance of interest provided in the 1924 Act applied retroactively to refunds allowed under the 1921 Act.

Upon these considerations the conclusion would follow that the 1924 Act has no application to the computation of interest in this case. Since the judgment of the Court of Claims includes the allowance of interest on taxes paid for the year 1916 from the date of payment and admittedly no protest was filed as to such year (R. 24), as was necessary under the Revenue Act of 1921, to entitle the taxpayer to interest from the date of payment, judgment should be reversed.

II

THE PROTEST FILED WHEN THE 1917 TAX WAS PAID WAS INSUFFICIENT, IF THE 1921 ACT APPLIES, TO ENTITLE THE RESPONDENT TO INTEREST ON THE REFUND FROM THE DATE OF PAYMENT OF THE TAX

This question as to the sufficiency of the protest accompanying the payment of the 1917 tax to entitle the respondent to interest on the refund computed from the date of payment, is directly raised by the findings and in the petition for certiorari. (R. 5.)

The Court of Claims states in its opinion that because the case was believed to be controlled by the Revenue Act of 1924 it was not necessary to determine the question as to the sufficiency of the protest filed with the payment of the 1917 taxes (R. 39), but its findings may have gone further than the opinion. In Finding V (R. 25) it is stated that payment of the 1917 tax "was accom-

panied by a written specific protest which set forth in detail the basis of and reasons for such protest." In the next sentence in the findings it is stated:

> Such protest was in words and figures as follows,

and then is set forth the protest itself. The material part of the protest is as follows:

> The grounds, among others, of such protest and involuntary payments, are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint-stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess profits tax law is arbitrary and unjust, and without sanction in said act.

The findings further show that this protest did not include any grounds on which the refund of 1917 taxes was afterwards made, and show that of the refund allowed for 1917 $1,025,519.52 was allowed on grounds not mentioned either in the protest made when the tax was paid or even in the claims for refund (R. 31), and that $105,556.34, the entire balance of the refund for 1917, was based on grounds not mentioned in the protest, but first

raised in the third amended return and claim for refund filed in 1920 (R. 27, 31). These specific findings as to the form of protest and as to the grounds on which the refund was finally allowed should be considered to overturn the general finding (R. 25) that the payment of the 1917 tax was accompanied by a written specific protest, setting forth in detail the basis of and reasons for such protest.

In *Girard Trust Company* v. *United States* (270 U. S. 163, 172), it was said:

> The Government's contention is that the distinction made in Section 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take

remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.

In the present case, the protest was based on a decision of the District Court of Connecticut made December 16, 1920. *Brewster* v. *Walsh*, 268 Fed. 207. That case was reversed in *Walsh* v. *Brewster*, 255 U. S. 536, March 28, 1921, or more than two months before the payment of the June 15 installment by the trustees. The statement added under the June 15 installment was merely a recital that an investigation was going on between the Government and the trustees, and that if that turned out to be in excess of the right amount, the payment was without prejudice to the recovery of the excess. This was certainly not a protest for specific reasons in accordance with the requirement of the statute. For these reasons, we think that no recovery can be had for failure to allow interest for the period of the six months after the date of payment.

Of course, no matter how specific the protest may be, if it does not state a ground on which a claim for refund can be or is allowed, it is insufficient to entitle the taxpayer to interest from the date the tax was paid.

It is plain that the protest in this case does not meet the test laid down in the *Girard Trust Company case*.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
SEWALL KEY,
Attorney.

DECEMBER, 1927.

○

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WILLIAM D. MITCHELL,
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DECEMBER, 1927.

○

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IN THE

Supreme Court of the United States

No. 283.

OCTOBER TERM, 1927.

THE UNITED STATES, *Petitioners,*

vs.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. WAVERLEY SMITH, ET AL., ETC.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO THE PETITION.

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Dallas, Texas,
Of Counsel.

Dated August 6, 1927.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

No. 283.

October Term, 1927.

The United States, *Petitioners*,

vs.

Magnolia Petroleum Company, E. R. Brown, R. Waverley Smith, et al., etc.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO THE PETITION.

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The petition should be denied because:

(A) RESPONDENT, AS HELD BY THE COURT BELOW, IS ENTITLED TO INTEREST UNDER SECTION 1019 OF THE REVENUE ACT OF 1924 UPON THE TOTAL REFUNDS FROM THE DATES THE TAXES WERE PAID TO THE DATE OF THE ALLOWANCE OF THE CLAIMS	17
(B) EVEN THOUGH SECTION 1324(A) OF THE REVENUE ACT OF 1921 WERE APPLICABLE, AS ALLEGED BY THE COMMISSIONER OF INTERNAL REVENUE, RESPONDENT HAS FULLY MET THE REQUIREMENTS OF THAT SECTION	26
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CORRECTION OF ERRORS IN PETITION AND IN PETITIONERS' BRIEF.

The court would obtain an erroneous conception of both the pertinent facts and the statutes applicable in this case if it relied solely upon the petition and supporting brief. We will be specific.

First referring to the petition. There were no such provisions contained in the Revenue Act of 1921 [Sec. 1324(a)] as those alleged and placed in quotation marks in "B" of the petition (R. 1). That subparagraph of the Revenue Act of 1921 provided as follows:

> Sec. 1324(a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if not protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

In "C" of the petition (R. 2) in paragraph designated "First" reference is made to the "protests" which were filed when the taxes were paid. There is

a similar reference in "D" of the petition (R. 2). There was but one protest. As shown by Finding of Fact II (R. 24) the taxes for the year 1916 "were not paid under protest." By Finding of Fact V (R. 25) the taxes for the year 1917, the only other year here involved, were paid under protest.

This record contains no justification for the designation of respondent's formal protest as a "letter" as is done in petitioners' second assignment of error (R. 5). The protest is set forth in full in Finding of Fact V (R. 25).

Under "Reasons for Granting Writ" (R. 5) the first reason assigned is as follows:

> The decision in the instant case affects thousands of cases; and while the amount involved can not be calculated in a definite sum, it will run into millions of dollars.

In petitioners' brief (p. 8) under heading "Conclusion" there appears an averment to substantially the same effect.

These statements are devoid of support in the record or in fact. Counsel as officers of the court unhesitatingly express their conviction that this is not a "test case" but on the contrary an anomalous one. It has always been the custom of the Bureau of Internal Revenue under the Revenue Act of 1921, which was the first revenue act to provide for the payment of interest upon refunds, to pay the interest upon the refund at the same time the tax was refunded and in fact to include the interest in the same check by which the tax was refunded. Finding of Fact

XI (R. 28, 29) and Finding of Fact XII (R. 29, 30) each conclude with the statement, "Interest status will be determined as soon as the necessary data can be assembled." This was added in typewriting to the printed form. Note Exhibit "A" attached hereto, which is a photostatic copy of the original certificate of overassessment embodied in Finding of Fact XII. It there appears the printed form stated "Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit, from date," and that there appears below in the left corner the word "Interest" with space provided in which to insert the amount. It also appears from Exhibit "A" that on this original certificate of overassessment the printed words just quoted have been ruled through and the statement in respect of interest status being determined later has been added by typewriter. Thus it is apparent the printed form of certificate of overassessment, prepared to meet the requirements of the usual and ordinary case, shows that the practice in the Bureau of Internal Revenue was to refund taxes and the interest thereon at the same time and by one check. The record is silent as to why this practice was not followed in the instant case, the departure from which required the alteration of the regular printed form of certificate of overassessment. Thus in the instant case the usual procedure was not followed but an unusual one. Clearly, this case cannot affect "thousands of cases" as stated in the petition. Government counsel seem to rashly conclude that every case arising under the revenue laws must necessarily be a "test case" and

its determination involve many millions of dollars. That this is not always so is illustrated by the instant case, which is in no sense a "test case."

Referring now to the brief in support of the petition.

We submit "The Question Presented," appearing on the second page of petitioners' brief, would be fairer were the word "computation" in the sixth line thereof stricken out and the word "allowance" inserted in lieu thereof, so that the statement would read as follows:

The Question Presented.

> The principal question is whether interest on refunds of taxes should be computed on the basis prescribed by the Revenue Act of 1921, or on that prescribed by the Revenue Act of 1924, where the refund was allowed and the principal paid while the 1921 Act was in effect but the allowance and payment of the interest was delayed until after the passage of the 1924 Act.

Under the heading "The Statutes Involved" (p. 2), petitioners' counsel fail to refer to the express repeal, and without a saving clause, of section 1324 of the Revenue Act of 1921, by section 1100(a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 352). The effect of this repeal and the simultaneous reenactment of certain parts of section 1324 of the Act of 1921 by section 1019 of the 1924 Act, together with new provisions, are discussed under "A" in the argument which follows:

Petitioners' sole contention in this case is that interest upon the refunds made respondent should be determined in accordance with the provisions of the Revenue Act of 1921, whilst respondent insists the payment of interest must be made under the terms of the Revenue Act of 1924, as the Court of Claims held. If, in fact, interest had been "allowed" respondent by the Commissioner of Internal Revenue whilst the Revenue Act of 1921 was in force, it would obviously be quite helpful to petitioners' case. With the above in mind note the following appearing under the heading "Statement" in petitioners' brief (p. 4):

> On January 18, 1924, the Commissioner of Internal Revenue notified the plaintiff that interest had been allowed in the sum of $34,737.15, computed in accordance with Section 1324 of the Revenue Act of 1921, then in force (R. 31).

The above statement that interest "had been allowed" respondent by the Commissioner in his letter of January 18, 1924, is not correct. The quoted statement is an averment that there was an allowance of interest to respondent whilst the Revenue Act of 1921 was in force, which is shown by the record to be untrue. An examination of the communication of the Commissioner referred to (Finding of Fact XIII, R. 30-31) shows there was merely a calculation of interest but not a final allowance. Instead, respondent was invited by the Commissioner to file brief in support of its contentions in opposition to the amount of interest there calculated (R. 32). Fur-

ther, the amount of interest actually and officially "allowed" on July 21, 1924, *whilst the Revenue Act of 1924 was in force*, was not that stated in the Commissioner's letter of January 18, 1924, but $35,369.05. This is shown by the official "Notice of Interest Allowance" for each of the years involved (R. 34, 35).

On page 5 of petitioners' brief there is set forth an alleged copy of the protest which accompanied the payment of taxes by petitioner for the year 1917. The copy of the protest there given is incomplete in that the last sentence is omitted. A correct copy of such protest is embodied in Finding of Fact V (R. 25).

Petitioners' counsel state in their brief (p. 6) as follows:

> The Court of Claims found that this protest was general in terms and not specific or detailed (R. 32), and that the protest did not specify the basis on which the refund for the year 1917 was afterwards claimed and made (R. 32-33).

The Court of Claims did not so find. On the contrary, that court found that respondent had accompanied its payment of taxes for the year 1917 by "a written specific protest which set forth in detail the basis of and reasons for such protest" (Finding of Fact V, R. 25), which particular finding is the subject of petitioners' second assignment of error (R. 5) as follows:

> In holding that the letter set forth in the court's special findings of fact V was a written

specific protest which set forth in detail the basis of and reasons for such protest.

Counsel evidently failed to realize that the concluding paragraph of Finding of Fact XV (R. 32) was part of the letter of the Commissioner of Internal Revenue of February 9, 1924, and that the facts stated in such letter were not found by the court below. Closing quotation marks are placed at the end of the next to last paragraph whereas they should appear at the end of the last paragraph of Finding of Fact XV (R. 32). The letter of the Commissioner of Internal Revenue embodied in Finding of Fact XV is correctly set forth as Exhibit "F" of respondent's second amended petition (R. 20-22). Thus it was the Commissioner of Internal Revenue who held the protest insufficient. The Court of Claims, as shown by Finding of Fact V (R. 25), held to the contrary.

In the quotation from the Revenue Act of 1921, appearing in the second paragraph on page 7 of petitioners' brief, the word "specified" should be "specific" and the article "the" appearing before the word "reasons" should be omitted.

STATEMENT.

Because of errors and omissions in petitioners' "Statement" (petitioners' brief, p. 4), respondent submits the following:

Briefly the essential facts are:

Respondent paid federal income and income and

profits taxes as follows: (Finding of Fact II, R. 24 and Finding of Fact V, R. 25)

For the year 1916, income taxes	$ 215,852.72
For the year 1917, income and profits taxes	1,966,600.87
Total tax for the two years	$2,182,453.59

The taxes for the year 1916 were not paid under protest (Finding of Fact II, R. 24); those for the year 1917 were paid under protest (Finding of Fact V, R. 25).

Respondent filed refund claims within the time prescribed by law in respect of taxes for each of the above years as follows:

For the year 1916: On June 17, 1918, a second amended return, which showed respondent had overpaid its taxes in the amount of $30,217.11, was filed with the Commissioner of Internal Revenue and was attached to and made a part of a refund claim in that amount (Finding of Fact III, R. 24). Thereafter a "third amended return was attached to and made a part of a refund claim which was filed with the Collector of Internal Revenue at Dallas, Texas, on September 20, 1920, as aforesaid, and was for the refundment of $114,565.44, 'or such greater amount as is legally refundable'" (Finding of Fact IV, R. 24).

For the year 1917: On June 12, 1920, respondent duly filed with the Collector of Internal Revenue a refund claim for $1,966,600.87, being the full amount of taxes which it paid for said year (Finding of Fact

VI, R. 26), and "Thereafter, to wit, on September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue another refund claim on account of the year 1917 for the sum of $1,005,519.42, 'or such greater amount as is legally refundable.' There were attached to such claim and made a part thereof, third amended income and excess-profits tax returns for the calendar year 1917, which indicated a total income and war excess-profits tax liability on the part of plaintiff for the year 1917 in the amount of $961,081.45." (Finding of Fact VI, R. 27).

At this point Findings of Fact VII and VIII (R. 27) become pertinent. They are respectively as follows:

> Shortly after plaintiff, on September 20, 1920, filed its aforesaid refund claims for the years 1916 and 1917 of which claims a third amended return for each of such years was made a part, plaintiff, by its proper representatives actively negotiated with officials of the Bureau of Internal Revenue to secure settlement of its taxes for the years 1916 and 1917 and refunds of overpayments which it had made for said years.
>
> Plaintiff furnished to the proper representatives of the Bureau of Internal Revenue all necessary facts and data in support of its refund claims theretofore filed for the years 1916 and 1917 and in a manner acceptable to the officials of said bureau and in accordance with its rules and regulations.

Thus it is shown respondent filed two refund claims for each of the years involved and the second refund claim for each year filed on September 20, 1920, had

attached thereto and made a part thereof, third amended returns.

Under date of October 8, 1923, the Commissioner of Internal Revenue advised respondent in respect of its refund claims for these years as follows:

> The claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49, and the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01. The claims for refund of $30,217.11 income taxes for 1916 and $1,005,519.42 income and profits taxes for the year 1917 will be rejected in full.
>
> The rejection of the claims in the above amounts will appear officially in the next schedule to be approved by the commissioner (Finding of Fact IX, R. 27).

The court below found as a fact that respondent's claims were allowed by the Commissioner of Internal Revenue in the respective amounts given above, on October 11, 1923 (Finding of Fact X, R. 28).

The above action was followed by the receipt by respondent on November 22, 1923, of an official "Certificate of Overassessment" in respect of each of these years, showing an overassessment in the respective amounts shown above. Each of these certificates stated:

> This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as pre-

scribed * * * (Findings of Fact XI and XII, R. 28, 29).

There accompanied the above mentioned certificates of overassessment government check in payment of the amount in which, as shown, respondent had been advised by the Commissioner, the refund claims had been "allowed," such amounts being as follows: (Finding of Fact XIII, R. 30):

For the year 1916, income taxes	$ 105,571.95
For the year 1917, income and excess profits taxes	1,131,075.86
Total tax refunded	$1,236,647.81

No interest was paid plaintiff at the time of the above mentioned refund. The certificates of overassessment each concluded with the statement that "Interest status will be determined as soon as the necessary data can be assembled" (Finding of Fact XI, XII, R. 28, 29).

About two months after the refundment which, as shown, was made on November 22, 1923, as a result of the "allowance" of respondent's claims, the Commissioner of Internal Revenue took the position that interest could only be paid upon a refund to the extent that it was predicated on the "basis of the claim." As shown by Finding of Fact XIII (R. 30, 31) under date of January 18, 1924, the Commissioner advised respondent that—

> Section 1324(a) of the revenue act of 1921 authorizes the payment of interest on amounts re-

> funded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount allowed other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed.

The above is followed by a calculation of interest proposed to be allowed on the "basis of claim" theory but there is no explanation offered there nor elsewhere in the record as to what was the "basis of claim" nor how the proposed amount of interest was ascertained by the use of that theory. This position of the Commissioner of Internal Revenue was contrary to the established practice of the Bureau of Internal Revenue (Finding of Fact 20, R. 36).

The Commissioner of Internal Revenue persisted in his refusal to increase the amount of interest to be allowed [with the exception of a slight increase due to a mistake theretofore made by the Commissioner in regard to the date upon which one of the claims for the year 1917 was filed and corrected in the second paragraph of his letter to respondent dated July 2, 1924, contained in Finding of Fact XVI (R. 33)] and under date of July 21, 1924, sent to respondent a "Notice of Interest Allowance" in respect of each of the years 1916 and 1917 together with check in payment of the interest as shown by these certificates to have

been allowed in the total amount of $35,369.05 (Finding of Fact XVII, R. 35). The interest allowance in respect of the refund for each of the years involved is shown by these notices of interest allowance as follows:

Year 1916, Interest allowed on refund of $105,571.95	$19,171.21
Year 1917, Interest allowed on refund of $1,131,075.86	16,197.84
Total	$35,369.05

Respondent protected its rights to claim additional interest in the Treasury Department and in the courts (Finding of Fact IX, R. 11).

Counsel have prepared from facts in the record the two following tables, which show, it is hoped, in convenient and helpful form, the salient facts in respect of respondent's returns and refund claims and the action of the Commissioner of Internal Revenue upon the claims.

YEAR 1916

TABLE SHOWING FILING OF RETURNS AND REFUND CLAIMS BY RESPONDENT AND ACTION OF COMMISSIONER OF INTERNAL REVENUE UPON CLAIMS.

Tax Paid	$215,852.72
Tax refunded	105,571.95
Net tax	$110,280.77
Interest paid on refund	19,171.21

Returns Filed and Taxes Paid.	*Claims Filed.*	*Action of Commissioner upon the Claims as Shown by his Letter of Oct. 8, 1923, (Finding IX, R. 27) and by his certificate of Overassessment No. 118,905. (Finding XI, R. 28.)*	*Position of Commissioner in his Letter of Jan. 18, 1924. (Finding XIII, R. 30.)*
Mch. 27, 1917. *Original Return* showing tax of $206,079.86. Paid June 14, 1917. (Finding II, R. 24.)			
June 15, 1917. *First Amended Return* showing additional tax of $9,772.86. Paid under "additional assessment" August 7, 1917. (Finding II, R. 24.)			
June 17, 1918. *Second Amended Return* showing overpayment of $30,217.11. (Finding III, R. 24.)	June 17, 1918, with Second Amended Return. (Finding III, R. 24.)	Rejected in full. (Finding IX, R. 27.)	Said to be allowed for $22,360.22.*
September 20, 1920. *Third Amended Return* showing tax liability of $101,287.28. (Finding IV, R. 24.)	Sept. 20, 1920, with *Third Amended Return*. Claim for $114,565.44, "or such greater amount as is legally refundable." (Finding IV, R. 24.)	Allowed for $105,571.95* (total refund for year 1916) and rejected for $8,993.49. (Finding X, R. 28.)	Said to be allowed for $82,853.32.*
		*Refunded November 22, 1923.	*Balance of 1916 refund, viz., $358.41, said to be "allowed upon the basis of points not raised in claims." (Finding XIII, R. 30.)

YEAR 1917

TABLE SHOWING FILING OF RETURNS AND REFUND CLAIMS BY RESPONDENT AND ACTION OF COMMISSIONER OF INTERNAL REVENUE UPON CLAIMS.

Tax paid	$1,966,600.87
Tax refunded	1,131,075.86
Net tax	835,525.01
Interest paid on refund	16,197.84

Returns Filed and Taxes Paid.	*Claims Filed.*	*Action of Commissioner Upon the Claims as Shown by his Letter of Oct. 8, 1923 (Finding IX, R. 27) and by his Certificate of Overassessment No. 16,566 (Finding XI, R. 28).*	*Position of Commissioner in his Letter of January 18, 1924 (Finding XIII, R. 30).*
May 18, 1918. *Original Returns.* No tax paid thereunder. (Finding V, R. 25.)			
May 27, 1918. *First Amended Returns* showing tax of $1,966,600.87. Paid June 13, 1918, under protest. (Finding V, R. 25.)	June 12, 1920. Claim for $1,966,600.87. (Finding VI, R. 26.)	Allowed for $1,131,075.86* (total refund for year 1917). Rejected for $835,525.01.	Said no part of overassessment was allowed on basis of this claim.
January 28, 1919. *Second Amended Returns* showing additional tax of $5,390.17. *Never paid.* (Finding V, R. 25.)			
September 20, 1920. *Third Amended Returns* which showed tax liability of $961,941.45. (Finding VI, R. 27.)	September 20, 1920. Claim for $1,005,519.42 "or such greater amount as is legally refundable" filed with Third Amended Returns. (Finding VI, R. 27.)	Rejected in full.	Said to be allowed for $105,556.34*.
		*Refund made November 22, 1923.	*Balance of 1917 refund, viz., $1,025,519.52, made November 22, 1923, said to be "attributable to points not raised in claims." (Finding XIII, R. 30.)

ARGUMENT.

The petition should be denied because:

A.

RESPONDENT, AS HELD BY THE COURT BELOW, IS ENTITLED TO INTEREST UNDER SECTION 1019 OF THE REVENUE ACT OF 1924 UPON THE TOTAL REFUNDS FROM THE DATES THE TAXES WERE PAID TO THE DATE OF THE ALLOWANCE OF THE CLAIMS.

There are no authorities cited in petitioner's brief.

The refunds, as has been shown, were made on November 22, 1923. At that time the Revenue Act of 1921 (c. 136, 42 Stat. 227) was in force. Section 1324(a) thereof (p. 316) provided as follows:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

The above section was in force from November 23, 1921, to June 2, 1924. On the latter date the section

was expressly repealed by section 1100(a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 352) to take effect upon the enactment of that act which occurred on June 2, 1924. An examination of section 1100 of the Revenue Act of 1924 shows the absence of a saving clause in respect of section 1324 of the Revenue Act of 1921 pertaining to the payment of interest upon refunds. Section 1100(b) of the 1924 Act contains the usual saving clause in respect of the assessment and collection of taxes imposed by the earlier act. The provision for the payment of interest upon refunds in the Revenue Act of 1924 is contained in section 1019 thereof as follows:

> Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part. (43 Stat. 346).

The Committee on Ways and Means in House Report No. 179, 68th Congress, 1st Session, on H. R.

6715 which became the Revenue Act of 1924, after pointing out the changes made by section 1019 said: (p. 35)

> If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the period of their retention; and the fact of protest or a claim does not affect the merits of such an interest payment.

The same paragraph also appears in the report which is appended to the majority committee report and which contains the "Views of Eleven Republicans." (See p. 72).

It will be remembered the Commissioner of Internal Revenue made respondent no allowance of interest whilst the Revenue Act of 1921 was in force. On July 21, 1924, which was after the enactment of the Revenue Act of 1924, the Commissioner made respondent an interest allowance which he asserted was made under section 1324(a) of the Revenue Act of 1921, a section which, as shown, had theretofore been expressly repealed.

Whilst section 1324(a) of the Revenue Act of 1921 limited the right of recovery of interest to "the allowance of a claim for the refund of or credit for internal revenue taxes paid," section 1019 of the 1924 Act broadened that right by taking language from section 3220, Rev. Stat., as amended by the Act of 1918 (c. 18, 40 Stat. 1057, 1145) so as to cover "any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without au-

thority, or any sum which was excessive or in any manner wrongfully collected," the interest to run "from the date such tax, penalty or sum was paid to the date of the allowance of the refund." Those are the principal omissions from, additions to or modifications made in section 1019 of the latter act as compared with section 1324(a) of the former one but the grant of interest at 6 per cent per annum is the same in each section. That right was continued uninterruptedly by section 1019 of the 1924 Act. We submit that the provisions of the earlier act which were not reenacted died—they were annulled—and that hence neither the Commissioner of Internal Revenue nor anyone else could thereafter lawfully act thereunder.

In the case of Blair, Commissioner of Internal Revenue v. United States *ex rel.* Birkenstock, *et al.*, 6 Fed. (2d) 679, the Court of Appeals of the District of Columbia held interest upon a refundment of taxes must be made in accordance with the provisions of the law in force at the time the interest was allowed. Whilst there is a difference between that case and the instant one, in that under the decision of this Court, to which the case was brought by writ of certiorari, the allowance of the claim for refund was made after the enactment of the Revenue Act of 1924 and in the instant case prior thereto, nevertheless, since, as we shall presently show, the right to recover interest under a statutory grant, is a right separate and distinct from the right to recover the principal, we submit the Birkenstock case is decisive of the instant case. In its opinion in the Birkenstock case the Court of Appeals of the District of Columbia stated (p. 681):

> We agree with the judgment of the lower court. The record discloses that no finding or order respecting the payment of interest upon the refund was made, or could have been made, by the Commissioner until June 30, 1924, at which time the collector at Philadelphia reported the result of his examination. But before that time Congress repealed section 1324(a) of the Revenue Act of 1921; consequently the Commissioner was no longer authorized to proceed under it. After the repeal, his sole authority to order the disbursing clerk to pay interest upon such refunds was derived from section 1019 of the Revenue Act of 1924. Consequently the provisions of that section were controlling, and the interest upon this refund should have been computed accordingly.

The above quoted portion of the opinion was approved by this court (271 U. S. 348, 350).

The record in the instant case discloses that the Commissioner of Internal Revenue did not order the disbursing clerk to pay interest upon the refund until subsequent to the enactment of the Revenue Act of 1924. As shown by Finding XVI, (R. 33, 34) the Commissioner on July 2, 1924, advised respondent through its counsel in respect of the amount of interest which would be allowed and concluded his letter by stating, "The interest found due *will* be scheduled for allowance and payment." Hence the Commissioner's order to the disbursing clerk to pay this interest of necessity was subsequent to the date of such letter and more than a month subsequent to the passage of the Revenue Act of 1924,

at a time when, in the language of the Court of Appeals of the District of Columbia in the Birkenstock case, "* * * his sole authority to order the disbursing clerk to pay interest upon such refunds was derived from section 1019 of the Revenue Act of 1924." As shown by the quotation given above, the Court of Appeals held that the provisions of the 1924 Act under such facts were controlling and this conclusion, as also shown above, was approved by this court upon appeal. As well stated by the court below (R. 40):

> The final determination and allowance and also the payment of interest occurred after the act of 1924 became effective, at which time the sole existing provision of law for the payment of interest on refunds was that contained in section 1019 of the act of 1924.

In the case of Girard Trust Co., *et al.* v. United States, 270 U. S. 163, it was contended on behalf of the government that the interest provided by the Revenue Act of 1921 was an incident to the recovery of the principal, *i. e.*, the tax. In denying this contention this court said (pp. 168, 169):

> "In this case there is statutory provision for it," (the interest) "and it is analogous to a suit in debt or covenant in which the contract specifically provides for payment of interest on the principal debt. In such cases the authorities all hold that the acceptance of the payment of the principal debt does not preclude a further suit for the interest unpaid. * * * And the same rule obtains where the obligation is one that by

statute bears interest * * *" citing numerous authorities.

See also—

Bank v. Bank, 94 U. S. 437;
33 Corpus Juris 183;
39 Cyc. 768.

The Commissioner when he allowed interest to respondent on July 21, 1924, should have been governed solely by section 1019 of the Revenue Act of 1924 which contained the only statutory provisions then in force in respect of the payment of interest upon refunded taxes.

We invite attention to the following by Mr. Justice Peckham, speaking for the court in the case of Bear Lake Irrigation Company v. Garland, 164 U. S. 1, 11, 12, which case and those which followed it, cited below, we submit are controlling in the instant case:

> Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in Steam-

ship Co. v. Joliffe, 2 Wall. 450, 459. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act.

It is true that the law in the Joliffe case did not contain any saving of or provision for the rights and remedies of the pilot, but the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute, with modifications, did not rest alone upon this omission. It was chiefly based upon the facts above stated: the similarity of the subjects-matter of the two statutes, and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute.

Again as this court stated in Stewart v. Kahn, 11 Wall. 493, 502:

It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted can not be kept in force by construction, but are annulled.

This was followed by the famous case of Murdock v. City of Memphis, 20 Wall. 590. There the court said (p. 617):

> A careful comparison of these two sections (set forth in parallel columns, *supra*, pp. 592, 593—Rep.) can leave no doubt that it was the intention of Congress, by the later statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.

See also—

Campbell v. California, 200 U. S. 87.
Blair v. Chicago, 201 U. S. 400.
Goublin v. United States, Circuit Court of Appeals, Ninth Circuit, 261 F. 5.
Great Northern Ry. v. United States, Circuit Court of Appeals, Eighth Circuit, 155 F. 945.
Pennsylvania Co. v. United States, 236 U. S. 351.
Sutherland on Statutory Construction (2d Ed.) Sec. 237.

By the Revenue Act of 1926 (c. 27, 44 Stat. 9) there were changes made in respect of the payment of in-

terest upon refunded taxes but no change was made which would affect the payment of interest to respondent. See section 1116. The determination of the amount of interest due respondent under the Revenue Act of 1924 or under the Revenue Act of 1926 would be in identically the same amount as that for which the court below entered judgment. The repeal, therefore, by section 1200 of the 1926 Act of section 1019 of the 1924 Act is without effect in respect of the interest to which respondent is justly entitled.

The grant of interest can become effective only by its actual payment. The amount of such payment cannot be determined by the terms of a dead statute but must be ascertained in compliance with the terms of the only living statute on the subject.

We submit the soundness of this point has been demonstrated.

B.

EVEN THOUGH SECTION 1324(A) OF THE REVENUE ACT OF 1921 WERE APPLICABLE AS ALLEGED BY THE COMMISSIONER OF INTERNAL REVENUE, RESPONDENT HAS FULLY MET THE REQUIREMENTS OF THAT SECTION.

We repeat section 1324(a) of the Revenue Act of 1921:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or

(2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

A mere glance at that statute and the briefest consideration of the outstanding facts and a little mental arithmetic disclose at once a thwarting by the Commissioner of Internal Revenue of the legislative command to the serious financial detriment of respondent. We will demonstrate: As appears from the statute the shortest period of time for which interest could run would be from six months after filing refund claim to the date of the allowance of the claim and it also appears that interest is at the rate of one-half of 1 per centum per month and the interest is upon "the total amount of such refund." Thus we have the minimum period the interest may run, the principal and the rate of interest. In the instant case the latest claims were filed on September 20, 1920. Six months thereafter was March 20, 1921. The date of the allowance was October 11, 1923. Thus the minimum interest period was 2 years, 7 months and 21 days, or 31 months and 21 days, which at one-half of 1 per centum per month is over 15%. The total refund was $1,236,687.81 and 15% thereof is $185,503.17. This is the lowest possible sum respon-

dent could be entitled to under the Revenue Act of 1921. (As a matter of fact the record shows respondent was entitled to interest in an amount greatly in excess of this minimum). The Commissioner of Internal Revenue allowed and paid respondent interest in the amount of $35,369.05. Again, consider alone the refund of $1,131,075.86 for the year 1917 upon which the Commissioner paid respondent interest in the sum of but $16,197.84. This interest payment represents interest upon the allowed amount for less than four months, whereas the minimum period as shown above was over 31 months. It was these flagrant invasions of respondent's rights which the judgment of the Court of Claims corrected.

Adverting again to section 1324(a) of the Revenue Act of 1921 it will be noted the sole requirement in order that a taxpayer "shall" obtain interest is that there be an "*allowance of a claim* for the refund of or credit for internal revenue taxes paid." This sole requirement has been squarely met in this case. By the Commissioner's letter of October 8, 1923, (Finding of Fact IX, R. 27) respondent was informed that "the claim for refund of $114,565.44, income taxes for the year 1916, *will be allowed* for $105,571.95 and rejected for $8,993.49," and that "the claim for refund of $1,966,600.87 income and profits tax for 1917 *will be allowed* for $1,131,075.86 and rejected for $835,525.01." With regard to the overassessments (the amounts for which claims were allowed) the Commissioner stated in the certificate of overassessment sent to the respondent (Findings of Fact XI and XII, R. 28, 29) that each over-

assessment is "*allowed* in connection with the examination of a *claim for refund* filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the Revenue Act of 1921." These certificates of overassessment were accompanied by a Treasury warrant in full settlement of exactly the amount which respondent was informed that its "*claim*" would be "*allowed*" for and in exactly the amount which respondent was officially informed its *claims* had been "*allowed*" for. Accordingly there has been "*an allowance of a claim*" which secured to respondent the right to receive interest, in the words of section 1324(a), upon the "*total amount of such refund.*" The provision respecting the payment of interest upon the "*total*" amount of the refund is mandatory and grants no authority to the Commissioner of Internal Revenue or any other officer of the government to base the interest payment upon any other amount.

The Commissioner's letter of October 8, 1923, (Finding of Fact IX, R. 27) unequivocally states precisely what disposition will be made of the four claims therein referred to—two for the year 1916 and two for the year 1917. It points out that the claim for $30,217.11, which was filed on June 17, 1918, with the second amended return for the year 1916, will be rejected in full. It advised respondent that its claim of September 20, 1920, for $1,005,519.42 on account of the year 1917 will likewise be rejected in full. It then states that the claim of September 20, 1920, which was for the refundment of $114,565.44, the amount of tax which had been paid for the

year 1916, "will be allowed for $105,571.95 and rejected for $8,993.49," and further, that "the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01." Everyone knows that when a claim is presented to the Commissioner of Internal Revenue there can be but one of three actions taken thereon, (a) it may be allowed in full, (b) it may be rejected in full and (c) it may be allowed in part and rejected for the balance.

Three days after the above mentioned letter from the Commissioner of Internal Revenue to respondent the Commissioner "allowed" the two claims referred to in the amounts of which he had advised respondent. This also appears in the Commissioner's letter of January 18, 1924, to respondent (Finding of Fact XIII, R. 30). On November 22, 1923, still acting in accordance with the letter of October 8, 1923, the Commissioner of Internal Revenue actually refunded to respondent the precise sums which he had informed respondent by his letter of October 8, 1923, would be refunded to it upon the refund claims which it had filed.

The command of the statute is there in unmistakable terms "that upon the *allowance of a claim* * * * *interest* shall be allowed and paid upon the *total* amount of such refund * * *." Could any statute be more clear or explicit?

So we find this respondent in good faith presenting its claims and submitting evidence in support thereof in accordance with the rules of the Bureau. Then it was informed its claims would be allowed,

followed, three days later by an official allowance. Less than one and a half months later respondent received a check without interest in the amount that it was advised its claims would be allowed for and in the amounts its claims actually were allowed for.

Clearly the requirements of the statute had been fully met. After the requirements had been so met and the refunds made the Commissioner in attempting to justify his changed position which resulted in a reduction of interest payment to respondent from $401,168.47 (total of judgment below and interest paid July 21, 1924) to $35,369.05, stated in his letter of July 2, 1924, to respondent that "The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes." (Finding of Fact XVI, R. 33). We find the Commissioner in his letter of January 18, 1924, to respondent, (Finding of Fact XIII, R. 30) contradicting his former official communications in respect of which claims had been allowed. No explanations are offered for this extraordinary effort on the part of the Commissioner to undo accomplished facts. So also we find the Commissioner silent in respect of what is meant by the "basis of claim" invoked in his above mentioned letter of January 18, 1924, to respondent. The record shows amended returns were made a part of the refund claims and thus every item of gross income and every item of deduction was included in the claims but this seems to have been unavailing. The absence from the record of facts to sustain this "basis of claim" theory is fatal. It is a defense affirmatively

asserted and hence the burden was upon petitioner to support it. (Roach v. Summers, 87 U. S. 165.)

Under section 1324(a) of the Revenue Act of 192 interest upon a refund begins to run from the dat of payment of the tax if the tax was paid "under specific protest setting forth in detail the basi of and reasons for such protest." The cour below found that "The payment was made in voluntarily, under duress and in order to avoi distraint proceedings by the collector agains plaintiff's property and the payment of sai taxes by plaintiff was accompanied by a writ ten specific protest which set forth in detail th basis of and reasons for such protest" (Finding o Fact V, R. 25). It may be added that among othe averments respondent's protest stated that the term of the taxing statute were "ambiguous" and that th regulations were not authorized by the statute an that the method of applying the rates of tax in suc regulations was "arbitrary and unjust and withou sanction in said act" (Finding of Fact V, R. 25) In this connection note the nineteenth finding by th Court of Claims (R. 35):

> "Regulations No. 33 (revised) governing th collection of the income tax imposed by the ac of September 8, 1916, as amended by act o October 3, 1917," promulgated January 2, 191 were vague and ambiguous, especially in refer ence to depletion, inventories, and depreciatio so that it was impossible for plaintiff when i filed its first amended return on May 27, 191 to correctly calculate the amount of depletio and depreciation deductions to which plaintif

was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

The protest and findings of fact in the instant case fully meet the requirements of the statute as construed by the court in Girard Trust Co., *et al.* v. United States, 270 U. S. 163. The court there states (pp. 172-3):

> The Government's contention is that the distinction made in sec. 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.

> In the present case, the protest was based on a decision of the District Court of Connecticut made December 16, 1920. Brewster v. Walsh, 268 Fed. 207. That case was reversed in Walsh v. Brewster, 255 U. S. 536, March 28, 1921, or more than two months before the payment of the June 15 installment by the trustees. The statement added under the June 15 installment was merely a recital that an investigation was going on between the Government and the trustees, and that if that turned out to be in excess of the right amount, the payment was without prejudice to the recovery of the excess. This was certainly not a protest for specific reasons in accordance with the requirement of the statute. For these reasons, we think that no recovery can be had for failure to allow interest for the period of the six months after the date of payment.

In the petition it is stated if the Revenue Act of 1921 does apply the question remains

> Under sections 250, 252, and 1324(a) of the revenue act of 1921, was any interest payable on a refund allowed by the commissioner on his own motion and not on a ground assigned in the claim for refund? (R. 2)

Full discussion has heretofore been had of the basis of claim theory under section 1324 (a). In respect of sections 250 and 252 of the Revenue Act of 1921 relied upon by petitioners it is felt there is nothing which could more effectively dispose of petitioner's contentions thereunder than the following from the opinion of the court below. (R. 39)

These two sections have no connection whatever with a claim for refund, but are intended to relate to mistake in overpayment by the taxpayer appearing on the face of the return itself, discoverable by the examination provided for in section 250(b), directing the proper credit of such excess payment to taxes due by the taxpayer under any other return, "and any balance of such excess shall be *immediately* refunded to the taxpayer." They are based upon the correct theory that in the event of an overpayment of taxes by mistake, immediately discovered and corrected, the taxpayer should not be entitled to interest. But that is not the case here. In 1918 plaintiff filed claims for refund. These claims were pending and under investigation for five years or more when the commissioner made an allowance of refund amounting in the aggregate to $1,236,647.81, but denied interest on certain items concluded in the total amount refunded on the ground as stated in a letter to plaintiff, that "interest is not allowable upon any amount allowed, other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act without reference to a claim having been filed.

In the enactment of the various statutes on the subject it must have been the general purpose of Congress to save the taxpayer from whom taxes have been illegally or erroneously collected from all loss by paying interest on the amount refunded during the whole time the money was illegally retained by the Government. No interest is provided under section 252, for the simple reason that the excess payment is immediately refunded, and there is consequently no loss to the taxpayer.

Such a situation is in no sense analogous to the case of a taxpayer whose excess payment was retained by the Government for more than five years and was finally discovered in an investigation resulting from the filing of a formal claim for refund.

C.

CONCLUSION.

It has been shown, we submit, under A of the argument that the judgment of the Court of Claims was right in awarding respondent interest under section 1019 of the Revenue Act of 1924 upon the refunds from the dates the taxes were paid to the date of the allowance of the claims, and under B that even if section 1324(a) of the Revenue Act of 1921 were applicable respondent has fully met its requirements.

BARRY MOHUN,
Washington, D. C.,
Attorney for Respondent.

W. H. FRANCIS,
Dallas, Texas,
Of Counsel.

Dated August 6, 1927.

EXHIBIT 'A'

TREASURY DEPARTMENT

WASHINGTON

Office of
COMMISSIONER OF INTERNAL REVENUE

CERTIFICATE OF
OVERASSESSMENT

Number: 18256

Allowed: $1,121,072.84

Rejected: 0

INCOME TAX UNIT
IT:RD:S-1252-4

Magnolia Petroleum Company,

Dallas, Texas.

Sirs:

An audit of your income tax return for 1919, Forms 1031 and 1300 and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment May 1919, Page 688, Line 21	$1,966,650.97
Tax liability	[illegible]
Overassessment	$1,121,072.84 ✓

The adjustments resulting in the above overassessment are fully explained in schedules attached to a separate communication to you.

This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by Section 3228 of the Revised Statutes as amended by Section 1316 of the Revenue Act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be stated by the Collector of Internal Revenue for your district.

2. If the tax has been paid, the account of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

~~Included in the overpayment shown is interest on the amount stated below allowed on the refund or credit, from date~~

Interest status will be determined as soon as necessary data can be assembled. ✓

Schedule Number: 7564
District: San Texas

Amount abated: 0
Amount credited: 0
Year:
Account Number: S/15/485/3
Amount refunded: $ 1,121,072.84
Interest:

Respectfully,

[illegible]
Executive
Oct. 30, 1923

J. S. [illegible],
Deputy Commissioner.

By (Signed) S. Alexander
Head of Division

U. S. Examiner
Collector 1st Dist.

No. 283.

DEC 28 1927
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

THE UNITED STATES, *Petitioner*,

vs.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. WAVERLY SMITH, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

BARRY MOHUN,
Washington, D. C.,
Attorney for Respondent.

W. H. FRANCIS,
Dallas, Texas;
GEORGE E. ELLIOTT,
Washington, D. C.,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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POINT I.—

RESPONDENT, AS HELD BY THE COURT BELOW, IS ENTITLED TO INTEREST UNDER SECTION 1019 OF THE REVENUE ACT OF 1924 UPON THE TOTAL REFUNDS FROM THE DATES THE TAXES WERE PAID TO THE DATE OF THE ALLOWANCE OF THE CLAIMS 12

(a) *Congress possessed the power to change the provisions of section 1324(a) of the Revenue Act of 1921 in respect of the payment of interest upon refunds in all cases where such interest had not been theretofore paid* 12

(b) *Congress exercised this power by the enactment of section 1019 of the Revenue Act of 1924 and the simultaneous repeal of section 1324(a) of the Revenue Act of 1921* 17

POINT II.—

EVEN THOUGH SECTION 1324(A) OF THE REVENUE ACT OF 1921 BE HELD APPLICABLE, RESPONDENT WOULD BE ENTITLED TO INTEREST AS FOLLOWS:

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(A) FOR THE YEAR 1916: UPON THE REFUND OF TAXES ORIGINALLY PAID, FROM A DATE SIX MONTHS AFTER THE CLAIM WAS FILED TO THE DATE OF THE ALLOWANCE OF THE CLAIM; AND UPON THE REFUND OF TAXES PAID UNDER AN ADDITIONAL ASSESSMENT, FROM THE DATE OF PAYMENT TO THE DATE OF THE ALLOWANCE OF THE CLAIM.

(B) FOR THE YEAR 1917: (1) IF THE PROTEST BE HELD SUFFICIENT, UPON THE FULL AMOUNT OF THE REFUND FOR THAT YEAR FROM THE DATE OF PAYMENT TO THE DATE OF THE ALLOWANCE OF THE CLAIM; OR (2) IF THE PROTEST BE HELD INSUFFICIENT, UPON THE FULL AMOUNT OF THE REFUND FOR THAT YEAR FROM A DATE SIX MONTHS AFTER THE CLAIM WAS FILED TO THE DATE OF THE ALLOWANCE OF THE CLAIM 30

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 283.

THE UNITED STATES, *Petitioner*,

vs.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. WAVERLY SMITH, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

The "Statement" in petitioner's brief (pp. 5-9) is not complete and further contains certain inaccuracies due to inadvertence. Counsel, therefore, submit the following statement, which is as concise as the facts warrant.

STATEMENT.

Respondent paid federal income and income and profits taxes as follows (Finding of Fact II, R. 24, and Finding of Fact V, R. 25):

For the year 1916, income taxes.	$215,852.72
For the year 1917, income and profits taxes	1,966,600.87
Total tax for the two years....	$2,182,453.59

The taxes for the year 1916 were not paid under protest (Finding of Fact II, R. 24); those for the year 1917 were paid involuntarily and under a written protest as follows (Finding of Fact V, R. 25):

> "The Magnolia Petroleum Company hereby protests against the payment of Income Taxes which are alleged to be imposed by the Act approved September 8, 1916, as amended by the Act approved October 3, 1917, and the War Income Tax Act embodied in said Act approved October 3, 1917, and the War Excess Profits Tax Act embodied in said Act approved October 3, 1917. The said Company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid, by the Company under protest, involuntarily and under duress in order to avoid the penalties as prescribed in said Acts for non-payment which the Collector of Internal Revenue for this district states he will enforce against said Company in the event payment is not made. The grounds, among others, of such protest and involuntary payment are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint stock company or asso-

ciation or insurance company within the meaning and intendment of said Acts; the regulations which have been attempted to be prescribed under said Acts are not authorized thereby, and that the method of applying the rates of taxation as is attempted in Article 16 and in other articles of said regulations under the War Excess Profits Tax Law is arbitrary and unjust, and without sanction in said Act. The said company hereby formally notifies the said Collector of Internal Revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them or either of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs."

Finding of Fact XIX (R. 35) is as follows:

"Regulations No. 33 (Revised) Governing the collection of the Income Tax imposed by the Act of September 8, 1916, as amended by Act of October 3, 1917," promulgated January 2, 1918, were vague and ambiguous, especially in reference to depletion, inventories and depreciation so that it was impossible for plaintiff when it filed its first amended return on May 27, 1918 (R. 37, Q. 38), to correctly calculate the amount of depletion and depreciation deductions to which plaintiff was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and that the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

Respondent filed refund claims within the time prescribed by law in respect of taxes for each of the above years as follows:

For the year 1916: On June 17, 1918, a second amended return, which showed respondent had overpaid its taxes in the amount of $30,217.11, was filed with the Commissioner of Internal Revenue and was attached to and made a part of a refund claim in that amount (Finding of Fact III, R. 24). Thereafter a "third amended return was attached to and made a part of a refund claim which was filed with the Collector of Internal Revenue at Dallas, Texas, on September 20, 1920, as aforesaid, and was for the refundment of $114,565.44, 'or such greater amount as is legally refundable' " (Finding of Fact IV, R. 24).

For the year 1917: On June 12, 1920, respondent duly filed with the Collector of Internal Revenue a refund claim for $1,966,600.87, being the full amount of taxes which it paid for said year (Finding of Fact VI, R. 26), and "Thereafter, to wit, on September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue another refund claim on account of the year 1917 for the sum of $1,005,519.42, 'or such greater amount as is legally refundable.' There were attached to such claim and made a part thereof, third amended income and excess-profits tax returns for the calendar year 1917, which indicated a total income and war excess-profits tax liability on the part of plaintiff for the year 1917 in the amount of $961,081.45." (Finding of Fact VI, R. 27.)

At this point Findings of Fact VII and VIII (R. 27) become pertinent. They are respectively as follows:

> Shortly after plaintiff, on September 20, 1920, filed its aforesaid refund claims for the years 1916 and 1917 of which claims a third amended return of each of such years was made a part, plaintiff, by its proper representatives actively negotiated

with officials of the Bureau of Internal Revenue to secure settlement of its taxes for the years 1916 and 1917 and refunds of overpayments which it had made for said years.

Plaintiff furnished to the proper representatives of the Bureau of Internal Revenue all necessary facts and data in support of its refund claims theretofore filed for the years 1916 and 1917 and in a manner acceptable to the officials of said bureau and in accordance with its rules and regulations.

Thus it is shown respondent filed two refund claims for each of the years involved and the second refund claim for each year filed on September 20, 1920, had attached thereto and made a part thereof, third amended returns.

Under date of October 8, 1923, the Commissioner of Internal Revenue advised respondent in respect of its refund claims for these years as follows:

The claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49, and the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01. The claims for refund of $30,217.11 income taxes for 1916 and $1,005,519.42 income and profits taxes for the year 1917 will be rejected in full.

The rejection of the claims in the above amounts will appear officially in the next schedule to be approved by the commissioner (Finding of Fact IX, R. 27).

The above mentioned action of the Commissioner upon respondent's four refund claims is more clearly shown by the tables appearing on pages 10 and 11.

Finding X, R. 28, is as follows:

> The Commissioner of Internal Revenue upon facts duly furnished him by plaintiff with its refund claims, or separately, and upon facts agreed upon, allowed plaintiff's refund claims on October 11, 1923, as follows:
>
> Year 1916, claim filed September 20, 1920, for $114,565.44, allowed for $105,571.85. * * *
> Year 1917, claim filed June 12, 1920, for $1,966,600.87, allowed for $1,131,075.86. * * *

On November 22, 1923, respondent received an official "Certificate of Overassessment" in respect of each of these years, showing an overassessment in the respective amounts shown above. Each of these certificates stated:

> This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed * * * (Findings of Fact XI and XII, R. 28, 29).

There accompanied the above mentioned certificates of overassessment government check in payment of the amount in which, as shown, respondent had been advised by the Commissioner, the refund claims had been "allowed," such amounts being as follows (Finding of Fact XIII, R. 30):

For the year 1916, income taxes.	$105,571.95
For the year 1917, income and excess profits taxes	1,131,075.86
Total tax refunded	$1,236,647.81

No interest was paid plaintiff at the time of the above mentioned refund. The certificates of overassessment each concluded with the statement that "Interest status will be determined as soon as the necessary data can be assembled" (Finding of Fact XI, XII, R. 28, 29).

Under date of January 18, 1924, the Commissioner advised respondent that—

> Section 1324(a) of the revenue act of 1921 authorizes the payment of interest on amounts refunded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount allowed other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed (Finding of Fact XIII, R. 31).

The above is followed by a calculation of interest proposed to be allowed on the "basis of claim" theory but there is no explanation offered there nor elsewhere in the record as to what was the "basis of claim" nor how the proposed amount of interest was ascertained by the supposed use of that theory. This position of the Commissioner of Internal Revenue was contrary to the established practice of the Bureau of Internal Revenue (Finding of Fact XX, R. 36).

The Commissioner of Internal Revenue persisted in his refusal to increase the amount of interest to be allowed [with the exception of a slight increase due to a mistake theretofore made by the Commissioner in

regard to the date upon which one of the claims for the year 1917 was filed and corrected in the second paragraph of his letter to respondent dated July 2, 1924, contained in Finding of Fact XVI (R. 33)], and under date of July 21, 1924, sent to respondent a "Notice of Interest Allowance" in respect of each of the years 1916 and 1917 together with check in payment of the interest as shown by these certificates to have been allowed in the total amount of $35,369.05 (Finding of Fact XVII, R. 34). The interest allowance in respect of the refund for each of the years involved is shown by these notices of interest allowance as follows:

Year 1916, Interest allowed on refund of $105,571.95	$19,171.21
Year 1917, Interest allowed on refund of $1,131,075.86	16,197.84
Total	$35,369.05

In each of such notices it is stated the interest was allowed "Under section 1324(a) of the Revenue Act of 1921" (R. 34, 35). By section 1100(a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 352), section 1324(a) of the Revenue Act of 1921 (c. 136, 42 Stat. 227), was repealed to take effect upon the passage of the 1924 Act and by section 1019 of that act, which took effect simultaneously with that repeal, provision was made for the payment of interest upon refunds.

Respondent protected its rights to claim additional interest in the Treasury Department and in the courts (Finding of Fact XVIII, R. 35).

Respondent maintains it was entitled to interest upon the refundments made under section 1019 of the Revenue Act of 1924, as the court below held, or under

section 1116 of the Revenue Act of 1926 (c. 27, 44 Stat. 9). The amount of such interest would be the same under either the 1924 or 1926 Acts. Petitioner on the other hand asserts section 1324(a) of the 1921 Act governs. Respondent further maintains that even though that section of the 1921 Act did apply that the payment of interest to respondent in the amount of $35,369.05 on July 21, 1924, was not made in accordance with the provisions of that section of the Revenue Act of 1921. There are no facts in the record to show how the amount of interest paid respondent was arrived at.

Counsel have prepared from facts in the record the two following tables, which show, it is hoped, in convenient and helpful form, the salient facts in respect of respondent's returns and refund claims and the action of the Commissioner of Internal Revenue upon the claims.

YEAR 1916

TABLE SHOWING FILING OF RETURNS AND REFUND CLAIMS BY RESPONDENT AND ACTION OF COMMISSIONER OF INTERNAL REVENUE UPON CLAIMS.

Tax paid	$215,852.72
Tax refunded	105,571.95
Net tax	$110,280.77
Interest paid on refund	19,171.21

Returns Filed and Taxes Paid.	*Claims Filed.*	*Action of Commissioner upon the Claims as Shown by his Letter of Oct. 8, 1923, (Finding IX, R. 27) and by his certificate of Overassessment No. 118,905. (Finding XI, R. 28.)*	*Position of Commissioner in his Letter of January 18, 1924 (Finding XIII, R. 30).*
Mch. 27, 1917. *Original Return* showing tax of $206,079.86. Paid June 14, 1917. (Finding II, R. 24.)			
June 15, 1917. *First Amended Return* showing additional tax of $9,772.86. Paid under "additional assessment" August 7, 1917. (Finding II, R. 24.)			
June 17, 1918. *Second Amended Return* showing overpayment of $30,217.11. (Finding III, R. 24.)	June 17, 1918, with Second Amended Return. (Finding III, R. 24.)	Rejected in full. (Finding IX, R. 27.)	Said to be allowed for $22,360.22.*
September 20, 1920. *Third Amended Return* showing tax liability of $101,287.28. (Finding IV, R. 24.)	Sept. 20, 1920, with *Third Amended Return*. Claim for $114,565.44, "or such greater amount as is legally refundable." (Finding IV, R. 24.)	Allowed for $105,571.95* (total refund for year 1916) and rejected for $8,993.49. (Finding X, R. 28.)	Said to be allowed for $82,853.32.*
		*Refunded November 22, 1923.	*Balance of 1916 refund, viz., $338.43, said to be "allowed upon the basis of points not raised in claims." (Finding XIII, R.

YEAR 1917

TABLE SHOWING FILING OF RETURNS AND REFUND CLAIMS BY RESPONDENT AND ACTION OF COMMISSIONER OF INTERNAL REVENUE UPON CLAIMS.

Tax paid	$1,966,600.87
Tax refunded	1,131,075.86
Net tax	$835,525.01
Interest paid on refund	16,197.84

Returns Filed and Taxes Paid.	*Claims Filed.*	*Action of Commissioner upon the Claims as Shown by his Letter of Oct. 8, 1923, (Finding IX, R. 27) and by his certificate of Overassessment No. 16,366 (Finding XI, R. 28.)*	*Position of Commissioner in his Letter of January 18, 1924 (Finding XIII, R. 30).*
May 18, 1918. *Original Returns.* No tax paid thereunder. (Finding V, R. 25.)			
May 27, 1918. *First Amended Returns* showing tax of $1,966,600.87. Paid June 15, 1918, under protest. (Finding V, R. 25.) January 28, 1919. *Second Amended Returns* showing additional tax of $5,390.17. *Never paid.* (Finding V, R. 25.)	June 12, 1920. Claim for $1,966,600.87. (Finding VI, R. 26.)	Allowed for $1,131,075.86* (total refund for year 1917). Rejected for $835,525.01. (Finding IX, R. 27.)	Said no part of overassessment was allowed on basis of this claim.
September 20, 1920. *Third Amended Returns* which showed tax liability of $961,061.45 (Finding VI, R. 27.)	September 20, 1920. Claim for $1,005,519.42 "or such greater amount as is legally refundable" filed with Third Amended Returns. (Finding VI, R. 27.)	Rejected in full. (Finding IX, R. 27.)	Said to be allowed for $105,556.34.*
		*Refund made November 22, 1923.	*Balance of 1917 refund, viz., $1,025,519.52, made November 22, 1923, said to be "attributable to points not raised in claims." (Finding XIII, R. 30.)

ARGUMENT.

POINT I.

RESPONDENT, AS HELD BY THE COURT BELOW, IS ENTITLED TO INTEREST UNDER SECTION 1019 OF THE REVENUE ACT OF 1924 UPON THE TOTAL REFUNDS FROM THE DATES THE TAXES WERE PAID TO THE DATE OF THE ALLOWANCE OF THE CLAIMS.

The only pertinent facts under this point are the dates of the payments of the taxes by respondent for the years 1916 and 1917 and the date of the allowance of the refundments. Respondent established the other facts found out of an abundance of caution. They are pertinent only in the event the court should hold the provisions governing the payment of interest upon the refunds to respondent were those contained in section 1324(a) of the Revenue Act of 1921.

(a) *Congress possessed the power to change the provisions of section 1324(a) of the Revenue Act of 1921 in respect of the payment of interest upon refunds in all cases where such interest had not been theretofore paid.*

In this case petitioner contends Congress could not alter the rights of petitioner to interest upon these refunds by legislation subsequent to the refundment of the illegally exacted taxes. On page 9 of their brief counsel state:

> At the time the refund was allowed in this case the Revenue Act of 1921 was in force. The rights of the parties then became fixed.

Again on page 10:

The better view is that the right to interest which became fixed by the allowance of the refund while the 1921 Act was in effect was not divested or changed by the 1924 Act or by repeal of the 1921 Act.

In order that a right may amount to a vested right and be protected from impairment by the United States, it must constitute "property" under the due process clause in the Fifth Amendment. Contract rights in so far as they amount to property, are protected under this amendment from direct impairment by the Federal Government. *Hepburn v. Griswold*, 8 Wall. 603. Hence the position of petitioner must be founded upon the premise that the grant by Congress of interest upon refundments of internal revenue taxes constitutes a property right or a contract right amounting to property. This we submit is not the law. In this connection it is obviously unnecessary to attempt to broadly define when acts of Congress confer property rights and when they do not. In this case it is sufficient to show that statutes pertaining to the imposition, collection and refund of taxes do not confer property rights.

In *Brushaber v. Union Pacific Railroad*, 240 U. S. 1, which involved the constitutionality of the Revenue Act of 1913 (Sec. II, c. 16, 38 Stat. 166), which was the first income tax law passed after the adoption of the Sixteenth Amendment, the court in repelling the contention that such act contravened the constitution in that it attempted to deprive appellant of rights previously vested in him, said (p. 24):

> So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally

> well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat v. White*, 181 U. S. 264; *Patton v. Brady*, 184 U. S. 608; *McCray v. United States*, 195 U. S. 27, 61; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Billings v. United States*, 232 U. S. 261, 282.

In Cooley on Taxation, 2d Ed. Vol. 1, Sec. 134, p. 317, it is stated:

> So far as taxation is concerned, there is no vested right to the continuance of any particular tax, or particular apportionment of taxes.

There can be no doubt that provisions for the refund of taxes, and for the payment of interest thereon, are an exercise of the taxing power of Congress.

The principle asserted by petitioner if carried to its inevitable conclusion would mean a denial of the power of Congress to alter the status of a citizen under an existing taxing statute.

If the "right" to interest upon refunds were a fixed, definite, vested right, then Congress would be powerless to increase or decrease the rate of such interest or the conditions under which it became payable. If the interest right be of the character claimed by petitioner, it would follow that the rate of the tax itself could not be changed retroactively; nor would an income tax law, effective retroactively, be valid. To state this proposition is to answer it. See *Brushaber v. United States, supra; Tyee Realty Company v. Anderson* and *Thorne v. Same*, 240 U. S. 115; *Lynch v. Hornby*, 247 U. S. 339;

Atlantic Coast Line Railway Company v. Doughton, 262 U. S. 413, and *United States v. Heinszen*, 206 U. S. 370.

It is pertinent to note that Congress does not recognize as a vested right the grant of interest upon refunds of internal revenue taxes. This is well shown by sections 322 to 325 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 86, 87). By these sections the rates of estate and gift taxes which had been imposed by the Revenue Act of 1924 (c. 234, 43 Stat. 253, 303, 319) were retroactively reduced. Note the provisions of section 325 of the Revenue Act of 1926 as follows (italics added):

> Any tax that has been paid under the provisions of Title III of the Revenue Act of 1924 prior to the enactment of this Act in excess of the tax imposed by such title as amended by this Act shall be refunded *without interest*.

Thus those who received refunds of such taxes were denied interest thereon. By section 325 of the 1926 Act, just quoted, those taxpayers were taken out of the operation of section 1116 of that act, which provides for the payment of interest on "any" refunded internal revenue taxes. Indeed, prior to the passage of the Revenue Act of 1921 the Government had never paid interest on refunded internal revenue taxes. Congress by that act granted that which it had theretofore withheld. Congress saw fit to again withhold interest in the cases of refunds of taxes coming under Section 325 of the present revenue law.

The case of *Texas and Pacific Railway Company v. Anderson*, 149 U. S. 237, cited by petitioner's counsel on page 15 of their brief, is without bearing. The statute there involved was not an act of Congress but of

the legislature of a state. Hence the prohibition contained in the first clause of section 10 of Article I of the Constitution against the impairment by a state of the obligations of a contract was involved. Furthermore, the case does not sustain petitioner's contention for the reason that the amendatory act reducing the rate of interest upon judgments specifically provided that it should apply only to judgments "thereafter obtained." Where a state statute fails to contain similar language, the rule is that the new rate of interest provided by the amendatory act applies to judgments theretofore rendered and unpaid and from the date of the act to the date of payment. See *Morley v. Lake Shore, etc., Railway Company*, 146 U. S. 162. In reaching this conclusion, the court pointed out that the right of plaintiff to interest was not a vested right beyond "* * * the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe" (p. 169). In respect of such legislation the court said (p. 169):

> The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. "A judgment is, in no sense, a contract or agreement between the parties." *Wyman v. Mitchell*, 1 Cowen 316, 321. In *McConn v. New York Central, etc., Railroad*, 50 N. Y. 176, 180, it was said that "a statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract."

To the same effect see *Evans-Snider-Buel Company v. M'Fadden*, 105 Fed. 293, 300, and *Downs v. Blount*, 170 Fed. 15, 20.

On page 14 of petitioner's brief the Twenty per Cent. Cases, 20 Wall. 179, 187, are relied upon. These cases are clearly inapplicable because the statute there before this court was held to create a contractual right in the plaintiffs to the compensation provided.

In *League v. Texas*, 184 U. S. 156, a statute of the State of Texas providing for the collection of interest upon delinquent taxes was held a proper exercise of the legislative power, notwithstanding it applied retroactively. In reaching this conclusion the court pointed out (p. 158) that "a delinquent taxpayer ha no vested right in an existing mode of collecting taxes. There is no contract between him and the state that the latter will not vary the mode of collection." See also *State v. Western Union Telegraph Company*, 111 Minn. 21. Again, in *Webster v. Auditor General*, 121 Mich. 668, it was held that one owing delinquent taxes has no vested right to have the rate of interest thereon remain unchanged.

Having thus pointed out the undoubted power of Congress to change the grant of interest to respondent at any time prior to its payment, the remainder of this Point of the brief is devoted to showing that Congress did change the grant and, in keeping with the remedial character of the legislation, enlarged the grant so as to compensate taxpayers for the illegal retention of their monies by providing that payments of interest thereafter made be for the entire period of retention.

(b) *Congress exercised this power by the enactment of section 1019 of the Revenue Act of 1924 and the simultaneous repeal of section 1324(a) of the Revenue Act of 1921.*

The refunds were made to respondent as has been shown, on November 22, 1923. At that time the Revenue Act of 1921 (c. 136, 42 Stat. 227) was in force. Section 1324(a) thereof (p. 316) provided as follows:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

The above section was in force from November 23, 1921, to June 2, 1924. On the latter date the section was expressly repealed by section 1100(a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 352) to take effect upon the enactment of that act which occurred on June 2, 1924. An examination of section 1100 of the Revenue Act of 1924 shows the absence of a saving clause in respect of section 1324 of the Revenue Act of 1921 pertaining to the payment of interest upon refunds. Section 1100(b) of the 1924 Act contains the usual saving clause in respect of the assessment and collection of taxes imposed by the earlier act.

The provision for the payment of interest upon re-

funds in the Revenue Act of 1924 is contained in section 1019 thereof as follows:

> Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part. (43 Stat. 346).

The Committee on Ways and Means in House Report No. 179, 68th Congress, 1st Session, on H. R. 6715 which became the Revenue Act of 1924, after pointing out the changes made by section 1019 said (p. 35):

> If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the period of their retention; and the fact of protest or a claim does not affect the merits of such an interest payment.

The same paragraph also appears in the report which is appended to the majority committee report and which contains the "Views of Eleven Republicans." (p. 72).

It will be remembered the Commissioner of Inter-

nal Revenue made respondent no allowance of interest whilst the Revenue Act of 1921 was in force. On July 21, 1924, which was after the enactment of the Revenue Act of 1924, the Commissioner made respondent an interest allowance which he asserted was made under section 1324(a) of the Revenue Act of 1921, a section which, as shown, had theretofore been expressly repealed simultaneously with the enactment of the Revenue Act of 1924.

Whilst section 1324(a) of the Revenue Act of 1921 limited the right of recovery of interest to "the allowance of a claim for the refund of or credit for internal revenue taxes paid," section 1019 of the 1924 Act broadened that right by taking language from section 3220, Rev. Stat., as amended by the Act of 1918 (c. 18, 40 Stat. 1057, 1145) so as to cover "any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or any sum which was excessive or in any manner wrongfully collected," the interest to run "from the date such tax, penalty or sum was paid to the date of the allowance of the refund." Those are the principal omissions from, additions to or modifications made in section 1019 of the latter act as compared with section 1324(a) of the former one but the grant of interest at 6 per cent per annum is the same in each section. That grant was continued uninterruptedly by section 1019 of the 1924 Act. We submit that the provisions of the 1921 act which were not reenacted died—they were annulled—and that hence neither the Commissioner of Internal Revenue nor anyone else could thereafter lawfully act thereunder.

The record in the instant case discloses that the Commissioner of Internal Revenue did not order the dis-

bursing clerk to pay interest upon the refund until subsequent to the enactment of the Revenue Act of 1924. As shown by Finding XVI, (R. 33, 34) the Commissioner on July 2, 1924, advised respondent through its counsel in respect of the amount of interest which would be allowed and concluded his letter by stating, "The interest found due *will* be scheduled for allowance and payment." Hence the Commissioner's order to the disbursing clerk to pay this interest of necessity was subsequent to the date of such letter and more than a month subsequent to the passage of the Revenue Act of 1924.

On page 12 of petitioner's brief, counsel state:

> Subdivisions (b) and (c) (of Section 1100 of the Revenue Act of 1924) provide that certain portions of the Act of 1921 which are repealed shall remain in effect for the assessment and collection of taxes and for "the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes," and it may be contended that the interest referred to in this saving clause is interest owing to the Government and not to the taxpayer, but the obvious purpose of Congress was to preserve the operation of the 1921 Act on tax cases determined while it was in force.

It is not "contended" that the saving clause referred to embraces only interest "owing to the Government." There is no room for contention here at all—the reference in the statute is to the "collection" of interest. The language used is susceptible of no other interpretation. Were it not for the saving clause referred to, the government would have been powerless to collect back taxes due under the Revenue Act of 1921 which

was repealed by the Revenue Act of 1924. It seems almost superfluous to add that had Congress intended the result sought by petitioner, it would have enacted a saving clause in respect of the payment of interest upon refunds. Its failure to do so is perfectly consistent with its repeal of section 1324(a) of the Revenue Act of 1921 and its simultaneous reenactment thereof with modifications as section 1019 of the Revenue Act of 1924. The final reference in the quotation from petitioner's brief to the "obvious purpose of Congress" to preserve the operation of the 1921 Act on "tax cases" determined while it was in force could not be wider of the mark. If counsel's statement were correct, none of the provisions of the Revenue Act of 1924 in respect of taxes imposed by the Revenue Act of 1921 and prior acts would have been enacted but the provisions of the earlier act would not have been repealed. If the purpose of Congress were as claimed by petitioner, the provisions in sections 277(1) and 310(a) in respect of an enlarged statute of limitations in favor of the United States in so far as applicable to taxes imposed by the 1921 Act would not have been enacted.

We now invite the court's attention to the effect of the repeal of section 1324(a) of the Revenue Act of 1921 on June 2, 1924, by the Revenue Act of that year and its reenactment, with modifications, as section 1019 of the latter act. Under such circumstances the universally accepted rule of statutory construction requires that section 1019 of the 1924 Act shall be treated as a continuation of section 1324(a) of the 1921 Act with the modifications contained in the later section just as though such modifications had been contained in section 1324(a) as originally enacted.

This is the gist of the case. The power of Congress in the premises has been shown. When the Commissioner in July, 1924, came to pay respondent interest he should have acted strictly in accordance with the provisions of the only existing law upon the subject, *i. e.*, section 1019 of the 1924 Act. There had been an "allowance" of a refund to respondent as provided in that section. Hence it was clearly the Commissioner's duty to pay to respondent interest in the manner there provided. We now invite attention to the following authorities which, we submit, are conclusive.

In *Blair v. Chicago*, 201 U. S. 400, 475, the court stated:

> As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *People v. Circuit Judge*, 37 Michigan, 287. In *Conrad v. Nall*, 24 Michigan, 275, a section in the chapter of the code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter in its present form must be read as one act. The rule is correctly stated in **Endlich on Statutes, section 294**, as follows: "A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated."

The case of *Blair v. Chicago, supra*, was cited with approval in *Pennsylvania Company v. United States*,

236 U. S. 351, 362, and was followed in *Selectmen of Brookline, Petitioners*, 236 Mass. 269.

Note the following by Mr. Justice Peckham, speaking for the court in the case of *Bear Lake Irrigation Company v. Garland*, 164 U. S. 1, 11, 12:

> Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in Steamship Co. v Joliffe, 2 Wall. 450, 459. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act.
>
> It is true that the law in the Joliffe case did not contain any saving of or provision for the rights and remedies of the pilot, but the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute, with modifications, did not rest alone upon this omission. It was chiefly based upon

> the facts above stated: the similarity of the subjects-matter of the two statutes, and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute.

Counsel for petitioner at page 14 of their brief quote from the case of Steamship Company v. Joliffe which is commented upon by the court in its opinion in the Bear Lake Irrigation Company case, *supra*, as shown by the quotation just given.

Clearly there is nothing in the Joliffe case to sustain petitioner's contentions. No one would know from petitioner's quotation from the opinion in the Joliffe case (their brief, p. 14) that an amendatory act had been passed. However, the amendatory act formed the basis of the court's decision. This is shown by the analysis of the opinion in the Joliffe case contained in the opinion in the Bear Lake Irrigation case where the court states "* * * the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute, with modifications * * *, was chiefly based upon the facts above stated: the similarity of the subjects-matter of the two statutes and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute." (164 U. S. 12.)

It is pertinent here to invite attention to the recent case of *Art Metal Works v. Commissioner of Internal Revenue* before the United States Board of Tax Appeals, Docket No. 16,226, decided Dec. 6, 1927 (not yet reported but see United States Daily, December 9th, 1927, p. 12).

The position of the General Counsel of the Bureau

of Internal Revenue upon the question presented in that case is shown by the following from the opinion of the Board of Tax Appeals:

> Respondent, however, insists that the provision of the Revenue Act of 1924 which repealed the Revenue Act of 1921 as of January 1, 1924, removes the 1921 Act from consideration, and, the five years for collection not having expired prior to the repeal of that Act, any limitation must be found in the 1924 Act substituted for it.

The Board, citing numerous cases in the federal courts, sustained this contention—a contention which is in direct conflict with that made by petitioner's counsel in the instant case.

These cases stand unmodified. They likewise negative the assertion that respondent is seeking a retroactive interpretation of the Revenue Act of 1924 as made by petitioner's counsel on page 10 of their brief.

As shown in the "Statement" herein, it is immaterial to respondent whether it be held the provisions of the 1924 Act (section 1019) in respect of the payment of interest upon refunds are applicable or those of the Revenue Act of 1926 (section 1116). Under either section the amount of interest would be that for which the court below rendered judgment.

Section 1116 of the Revenue Act of 1926 is as follows:

> Sec. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax,

penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

(b) As used in this section—

(1) The term "additional assessment" means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency under Title II or Title III of the Revenue Act of 1924 or of this Act;

(2) The term "date of the allowance of the refund" means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of over-assessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date.

By section 1200 of the 1926 Act, section 1019 of the 1924 Act was repealed, such repeal taking effect simultaneously with the enactment of the former act.

The policy of continuing legislation by Congress in respect of interest upon refunds is thus again shown by section 1116 of the present law. Subdivision 2 of paragraph (b) thereof was enacted to meet the issue presented in the case of *Girard Trust Co. v. United States*, then pending before this court, and decided March 1, 1926, 270 U. S. 163. Paragraph (c) was drawn clearly in the light of the case of *Blair v. United States ex rel Birkenstock and Ronon, Executors*, etc., also then pending before this court and decided on May 24, 1926, 271 U. S. 348.

In the Birkenstock case as the Commissioner of Internal Revenue viewed it, the refund had been "allowed" on May 19, 1924, when he signed the "schedule of overassessment." In this the Commissioner was in error for the court held in the Girard Trust Company case, *supra*, that the "date of allowance" was the day the Commissioner notified the disbursing clerk to pay the refund which in the Birkenstock case was August 12, 1924, which was after the passage of the Revenue Act of 1924.

The court in the Birkenstock case reaffirmed the Girard Trust Company case and further held that where a tax is paid in quarterly installments interest is payable only on the excess over the total amount of the tax and is computed upon the excess from the date paid. Thus if the refunded tax is less than the last installment interest upon the refund begins from the date of payment of such installment. If the refund exceeds the amount of the last installment but not of the two last installments interest is determined upon the full amount of the last installment from its date of payment and upon the balance of the refund from the date of payment of the third installment of tax. Both the Girard Trust Co. case and the Birkenstock case are cited in petitioner's brief. It will be seen from what has just been stated, neither case particularly bears upon the issues here presented.

It seems hardly necessary to add that (c) of section 1116 of the Revenue Act of 1926 in no wise militates against plaintiff's contention. We can find in the subdivision nothing susceptible of an interpretation to prohibit the payment of interest where the refund or

credit was made prior to the passage of the act. Not only would such a construction be contrary to the declared purpose of Congress in respect of these several acts as interpreted in the light of universally accepted rules of construction, but it would cause an omission or interval during which the direction to pay interest would be suspended, a result in the very teeth of the continued policy of legislation and one which would result in manifest injustice to taxpayers. For example, it would mean the Commissioner of Internal Revenue could have defeated the declared purpose of Congress if he made a refund to taxpayers on or before February 25, 1926, of only the illegal exaction, and then upon the enactment of the Revenue Act of 1926 on the following day refused to pay interest. If the inference to be drawn from such a narrow and forced construction of section 1116 (c) be sound the taxpayer would be powerless. It must not be overlooked that in substance that is the very treatment which this plaintiff has received.

We might add it is elemental that the law never creates a vacuum in right except in positive terms. One may look in vain for any positive or other terms which sustain the contention that there has been a suspension of the grant of interest upon refunds allowed since November 23, 1921, the date of the enactment of the Revenue Act of 1921.

The legislative command that upon the "allowance" of a "refund" or "credit," interest shall be paid upon the amount thereof at the rate of 6 per centum per annum has been in force without an instant's interruption since November 23, 1921. We quote again from the opinion of the Court in the case of the *Bear Lake Irrigation Company v. Garland, supra:*

Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act.

POINT II.

EVEN THOUGH SECTION 1324(A) OF THE REVENUE ACT OF 1921 BE HELD APPLICABLE, RESPONDENT WOULD BE ENTITLED TO INTEREST AS FOLLOWS:

(A) FOR THE YEAR 1916: UPON THE REFUND OF TAXES ORIGINALLY PAID, FROM A DATE SIX MONTHS AFTER THE CLAIM WAS FILED TO THE DATE OF THE ALLOWANCE OF THE CLAIM; AND UPON THE REFUND OF TAXES PAID UNDER AN ADDITIONAL ASSESSMENT, FROM THE DATE OF PAYMENT TO THE DATE OF THE ALLOWANCE OF THE CLAIM.

(B) FOR THE YEAR 1917: (1) IF THE PROTEST BE HELD SUFFICIENT, UPON THE FULL AMOUNT OF THE REFUND FOR THAT YEAR FROM THE DATE OF PAYMENT TO THE DATE OF THE ALLOWANCE OF THE CLAIM; OR (2) IF THE PROTEST BE HELD INSUFFICIENT, UPON THE FULL AMOUNT OF THE REFUND FOR THAT YEAR FROM A DATE SIX MONTHS AFTER THE CLAIM WAS FILED TO THE DATE OF THE ALLOWANCE OF THE CLAIM.

The record contains all facts necessary to a determination of the interest payable under each of the bases embraced in this Point.

In respect of subdivision (A) of this Point pertaining to the year 1916, the court below held that section 1019 of the Revenue Act of 1924 was applicable (R. 39), and found, as shown by its Conclusion of Law (R. 36), that respondent "is entitled to recover interest at the rate of 6 per cent per annum to October 11, 1923, on $95,799.09 from June 14, 1917, on $9,772.86 from August 7, 1917 * * *."

The total amount of the refund for the year 1916 is the sum of the two amounts stated in the "Conclusion of Law" quoted from above, *i. e.*, $105,571.95, which was paid respondent on November 22, 1923 (Finding of Fact XI, R. 28). The dates stated from which the interest began to run are those upon which respondent paid its taxes for the year. (Finding of Fact II, R. 24.) The date October 11, 1923, is the date of the allowance of the refund claim (Finding of Fact X, R. 28).

If section 1324 (a) of the Revenue Act of 1921 is applicable respondent insists it is entitled to interest at 6 per centum per annum on $95,799.09 to October 11, 1923, from March 20, 1921 (which is six months after respondent filed claim on September 20, 1920, and which was allowed October 11, 1923, (Finding of Fact IV and X, R. 24 and 28), and on $9,772.86 from August 7, 1917 (the date upon which respondent paid this amount under an "additional assessment") (Finding of Fact II, R. 24).

Petitioner maintains interest was due respondent for the year 1916, calculated in the manner indicated in a letter dated January 18, 1924, from the Commissioner of Internal Revenue to respondent's counsel and contained in Finding of Fact XIII (R. 30-32). In this regard counsel for petitioner have fallen into grave error in assuming that because the court below found

that the Commissioner had written to respondent the letter of January 18, 1924 (R. 30-32) that the court found as facts the statements contained in such letter. On pages 17 and 18 of petitioner's brief counsel refer to "These specific findings as to the form of protest and as to the *grounds on which the refund was finally allowed*" and cite record 31 in support thereof. As shown at record page 31, the Commissioner's letter of January 18, 1924, to respondent is set forth. In the body of that letter reference is made to overassessments being allowed upon "basis of points not raised in claims." No such fact is there established. Petitioner offered nothing to sustain this averment. On the contrary it will be recalled by Finding of Fact X (R. 28) the court affirmatively found that the Commissioner "allowed plaintiff's refund claims on October 11, 1923." The Commissioner's letter of January 18, 1924, attempts, as is shown under this Point of this brief, to undo a past and accomplished fact by asserting that part of respondent's refund claims was allowed under section 252 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 268) which pertains to a refund of taxes as a result not of a refund claim but solely "upon examination of any *return*."

We now purpose showing, assuming Section 1324(a) of the Revenue Act of 1921 (c. 136,42 Stat. 227, 316), to be applicable, that the record contains all facts requisite to a proper application of that section, and to further show the amounts of interest which would be due respondent thereunder. This part of the argument is applicable to both sub-divisions (A) and (B) of this Point.

At page 47 there is a table showing the amount of interest to which respondent is entitled under a

proper construction of section 1324(a) of the 1921 act for each of the years involved under each of the several bases stated in the Point and the amount of interest paid to respondent for such years by the Commissioner of Internal Revenue.

We repeat section 1324(a) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 316) was as follows:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

A mere glance at that statute and the briefest consideration of the outstanding facts and a little mental arithmetic disclose at once a thwarting by the Commissioner of Internal Revenue of the legislative command to the serious financial detriment of respondent. We will demonstrate: As appears from the statute the shortest period of time for which interest could run would be from six months after filing refund claim to the date of the allowance of the claim and it also appears that interest is at the rate of one-half of 1 per centum per month and the interest is upon "the total

amount of such refund." Thus we have the minimum period the interest may run, the principal and the rate of interest. In the instant case the latest claims were filed on September 20, 1920. Six months thereafter was March 20, 1921. The date of the allowance was October 11, 1923. Thus the minimum interest period was 2 years, 6 months and 21 days, or 30 months and 21 days. Interest upon the total refund of $1,236,687.81 for that period is $189,772.28. This is the lowest possible amount of interest respondent could be entitled to under the Revenue Act of 1921. (As a matter of fact as is presently shown under this Point, even under Section 1324(a) of the Revenue Act of 1921, respondent would be entitled to interest in an amount well in excess of this minimum). The Commissioner of Internal Revenue allowed and paid respondent interest in the amount of $35,369.05. Again, consider alone the refund of $1,131,075.86 for the year 1917 upon which the Commissioner paid respondent interest in the sum of but $16,197.84. This interest payment represents interest upon the allowed amount for less than three months, whereas the minimum period as shown above was over 30 months. It was these flagrant invasions of respondent's rights which the judgment of the Court of Claims corrected.

Adverting again to section 1324(a) of the Revenue Act of 1921 it will be noted the sole requirement in order that a taxpayer "shall" obtain interest is that there be an "*allowance of a claim* for the refund of or credit for internal revenue taxes paid." This sole requirement has been squarely met in this case. By the Commissioner's letter of October 8, 1923 (Finding of Fact IX, R. 27), respondent was informed that (italics added) "the claim for refund of $114,565.44, in-

come taxes for the year 1916, *will be allowed* for $105,571.95 and rejected for $8,993.49," and that "the claim for refund of $1,966,600.87 income and profits tax for 1917 *will be allowed* for $1,131,075.86 and rejected for $835,525.01." With regard to the overassessments (the amounts for which claims were allowed) the Commissioner stated in the official certificate of overassessment sent to the respondent (Findings of Fact XI and XII, R. 28, 29) that each over-assessment is (italics added) "*allowed* in connection with the examination of a *claim for refund* filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the Revenue Act of 1921." These certificates of over-assessment were accompanied by a Treasury warrant in full settlement of exactly the amount which respondent was informed that its "*claim*" would be "*allowed*" for and in exactly the amount which respondent was officially informed its *claims* had been "*allowed*" for. Accordingly there has been "*an allowance of a claim*" which secured to respondent the right to receive interest, in the words of section 1324(a), upon the "*total amount of such refund.*" The provision respecting the payment of interest upon the "*total*" amount of the refund is mandatory and grants no authority to the Commissioner of Internal Revenue or any other officer of the government to base the interest payment upon any other amount.

The Commissioner's letter of October 8, 1923, (Finding of Fact IX, R. 27) unequivocally states precisely what disposition will be made of the four claims therein referred to—two for the year 1916 and two for the year 1917. It points out that the claim for $30,217.11, which was filed on June 17, 1918, with the second amended

return for the year 1916, will be rejected in full. It advised respondent that its claim of September 20, 1920, for $1,005,519.42 on account of the year 1917 will likewise be rejected in full. It then states that the claim of September 20, 1920, which was for the refundment of $114,565.44, the amount of tax which had been paid for the year 1916, "will be allowed for $105,571.95 and rejected for $8,993.49," and further, that "the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01." Obviously when a claim is presented to the Commissioner of Internal Revenue there can be but one of three actions taken thereon, (a) it may be allowed in full, (b) it may be rejected in full, and (c) it may be allowed in part and rejected for the balance.

Three days after the above mentioned letter from the Commissioner of Internal Revenue to respondent the Commissioner "allowed" the two claims referred to in the amounts of which he had advised respondent. On November 22, 1923, still acting in accordance with the letter of October 8, 1923, the Commissioner of Internal Revenue actually refunded to respondent the precise sums which he had informed respondent by his letter of October 8, 1923, would be refunded to it upon the refund claims which it had filed.

The command of the statute is there in unmistakable terms "that upon the *allowance of a claim* * * * *interest* shall be allowed and paid upon the *total* amount of such refund * * *." Could any statute be more clear or explicit?

So we find this respondent in good faith presenting its claims and submitting evidence in support thereof in accordance with the rules of the Bureau. Then it

was informed its claims would be allowed, followed, three days later by an official allowance. Less than one and a half months later respondent received a check without interest in the amount that it was advised its claims would be allowed for and in the amounts its claims actually were allowed for.

Clearly the requirements of the statute had been fully met. After the requirements had been so met and the refunds made the Commissioner in attempting to justify his changed position which resulted in a reduction of interest payment to respondent from $401,168.47 (total of judgment below and interest paid July 21, 1924) to $35,369.05, stated in his letter of July 2, 1924, to respondent that "The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes." (Finding of Fact XVI, R. 33).

On page 7 of petitioner's brief it is stated:

> In due course the Commissioner of Internal Revenue acted on the various claims for refund, and on October 8, 1923, notified respondent that such claims would be allowed in the sum of $105,571.95, for the year 1916, and in the sum of $1,131,075.86 for the year 1917. (R. 31.)

The court would seem to be entitled to a few words of explanation in this regard. At page 31 of the record cited by petitioner the Commissioner's letter of October 8, 1923, does not appear. That letter is contained in Finding of Fact IX, R. 27. Indeed at page 31 of the record to which petitioner refers is the Commissioner's letter of January 18, 1924, in which the Commissioner attempts to undo his letter of October 8, 1923. The tables appearing herein (pp. 10 and 11) clearly show the inconsistent positions of the Commissioner in this regard.

We find the Commissioner in his letter of January 18, 1924, to respondent, (Finding of Fact XIII, R. 30) contradicting his former official communications in respect of which claims had been allowed. No explanations are offered for this extraordinary effort on the part of the Commissioner to undo that which had already been done.

This record is devoid of any finding to show the manner in which the Commissioner arrived at the amount of interest which he paid to respondent on July 21, 1924. In other words, respondent was advised (R. 31) interest was payable only upon that amount of the refund which was allowed upon the "bases of claims." There is no word in the record to show what constitutes "bases of claims" nor wherein the refunds made respondent by the Commissioner were predicated upon the "bases" of such claims. On the contrary the record shows amended returns were made a part of the refund claims and thus every item of gross income and every item of deduction was included in the claims. Further the record shows that such claims were actively prosecuted over a period of years with the result that they were officially "allowed" on October 11, 1923. (Findings of Fact IV, VI, VII, VIII, X, R. 24, 26-27, 27, 28.) The absence from the record of facts to sustain this "basis of claim" theory is fatal. It is elementary to state that the burden was upon petitioner to support this affirmative defense.

In respect of the payment of $9,772.86 paid by respondent on August 7, 1917 (Finding of Fact II, R. 24) under an "additional assessment," section 1324(a) of the Revenue Act of 1921 expressly provides that interest (italics added) "shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of

such allowance as follows: * * * if such amount was not paid under protest but *pursuant to an additional assessment, from the time such additional assessment was paid.*"

In view of the formal "allowance" of respondents claim for the year 1916, filed September 20, 1920, and actual refund thereunder of $105,571.95 we submit we have shown that under section 1324(a) of the Revenue Act of 1921 respondent is entitled to interest thereon at 6 per centum per annum as provided by the act, as follows:

On $95,799.09 from March 20, 1921 (six months after claim of September 20, 1920, was filed), to October 11, 1923 (the date of the allowance of the claim)	$14,700.57
On $9,772.86 from August 7, 1917 (the date this amount was paid under an "additional assessment" to October 11, 1923 (the date of the allowance of the claim).	3,605.65
Total interest account refund for year 1916.	$18,306.22
Commissioner of Internal Revenue allowed interest on account of refund for this year in the sum of (Finding of Fact XVII, R. 34)	19,171.21
Overpayment of interest	$864.99

This overpayment of interest for this year is due to the alleged allowance of claim filed June 17, 1918, in the amount of $22,360.22 as stated in Commissioner's letter of January 18, 1924, in which the Commissioner attempted to undo his prior action of October 11, 1923, when he formally allowed respondent's claim of September 20, 1920. This is well shown by the table on p. 10 in respect of the year 1916, columns 3 and 4.

Referring now to the year 1917 embraced in (B) (1) of this Point and which is that if the protest which accompanied respondent's payment for this year be held sufficient, respondent is entitled to interest upon the full amount of the refund from the date of payment to the date of the allowance of the claim, we submit as follows:

It will be recalled the requirement of section 1324(a) of the Revenue Act of 1921 in respect of protest was that there be "a specific protest setting forth in detail the basis of and reasons for such protest." There is no requirement that the protest state the grounds upon which the taxpayer might thereafter (probably many years thereafter) receive a refund of such taxes. Congress never expects citizens to do the impossible. No human being could foretell in June, 1918, when the taxes for 1917 were payable, what changes might result from future decisions of the courts or ruling by Bureau officials. But, nevertheless, we submit the record here discloses that not only does the protest of respondent set forth in detail "the basis of and reasons for *such protest*" but it goes further and embraces grounds upon which the refunds were thereafter made, *i. e.*, illegality of the Bureau's then regulations.

For convenience we repeat respondent's protest which accompanied its payment on June 15, 1918, of income and profits taxes for the year 1917 as follows (Finding of Fact V, R. 25):

> The Magnolia Petroleum Company hereby protests against the payment of Income Taxes which are alleged to be imposed by the Act approved September 8, 1916, as amended by the Act approved October 3, 1917, and the War Income Tax Act embodied in said Act approved October 3, 1917, and the War Excess Profits Tax Act embodied in

said Act approved October 3, 1917. The said Company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid by the Company under protest, involuntarily and under duress, in order to avoid the penalties as prescribed in said Acts for non-payment which the Collector of Internal Revenue for this district states he will enforce against said Company in the event payment is not made. The grounds, among others, of such protest and involuntary payment are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint stock company, or association or insurance company within the meaning and intendment of said Acts; the regulations which have been attempted to be prescribed under said Acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in Article 16 and in other articles of said regulations under the War Excess Profits Tax Law is arbitrary and unjust, and without sanction in said Act. The said Company hereby formally notifies the said Collector of Internal Revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them or either of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs.

On page 7 of petitioner's brief it is stated:

Original and amended income and excess profits tax returns for the year 1917 were filed by respondent on May 18, 1918, and May 27, 1918, respectively, indicating a liability of $1,966,600.87, which amount respondent paid on June 15, 1918, *under protest*, a copy of which is set forth in the

findings (R. 25), and which does not appear to state any ground on which refund was finally allowed (R. 31).

This statement is hardly justified by the record. The court below found that "The payment was made involuntarily, under duress and in order to avoid distraint proceedings by the collector against plaintiff's property and the payment of said taxes by plaintiff was accompanied by a written specific protest which set forth in detail the basis of and reasons for such protest" (Finding of Fact V, R. 25). It may be added that among other averments, as shown above, respondent's protest stated that the terms of the taxing statute were "ambiguous" and that the regulations were not authorized by the statute and that the method of applying the rates of tax in such regulations was "arbitrary and unjust and without sanction in said act" (Finding of Fact V, R. 25). In this connection note the nineteenth finding by the court below (R. 35):

> "Regulations No. 33 (revised) governing the collection of the income tax imposed by the act of September 8, 1916, as amended by act of October 3, 1917," promulgated January 2, 1918, were vague and ambiguous, especially in reference to depletion, inventories, and depreciation so that it was impossible for plaintiff when it filed its first amended return on May 27, 1918, to correctly calculate the amount of depletion and depreciation deductions to which plaintiff was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

The protest and findings of fact in the instant case fully meet the requirements of the statute as construed by the court in *Girard Trust Co. et al. v. United States*, 270 U. S. 163. The court there states (pp. 172-3):

> The Government's contention is that the distinction made in sec. 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.
>
> In the present case, the protest was based on a decision of the District Court of Connecticut made December 16, 1920. *Brewster v. Walsh*, 268 Fed. 207. That case was reversed in *Walsh v. Brewster*, 255 U. S. 536, March 28, 1921, or more than two months before the payment of the June 15 installment by the trustees. The statement added under the June 15 installment was merely a recital that an investigation was going on between the Government and the trustees, and that if that turned out to be in excess of the right amount, the

> payment was without prejudice to the recovery of the excess. This was certainly not a protest for specific reasons in accordance with the requirement of the statute. For these reasons, we think that no recovery can be had for failure to allow interest for the period of the six months after the date of payment.

The reference in the court's opinion to a "valid basis for a refund of the taxes" clearly does not mean a basis then recognized as valid by the department. If that were so the *payment* would not be required. It means a fair statement of bases which might, as in the instant case, thereafter be recognized by the department as valid. In this connection petitioner's brief states on page 19:

> Of course, no matter how specific the protest may be, if it does not state a ground on which a claim for refund can be or is allowed, it is insufficient to entitle the taxpayer to interest from the date the tax was paid.

Respondent's protest in this case fully met this test. The refunds were actually made because of the recognition by the Treasury Department several years later of the soundness of certain of the grounds of the protest. Other grounds, such as the unconstitutionality of the statute, were clearly such that a refund "can be" predicated thereon or could have been had this court for any reason held the Revenue Act of 1917, or parts thereof, unconstitutional. Revenue acts have been so held. See *Pollock v. Farmers Loan & Trust Company*, 157 U. S. 429. See also *Blodgett v. Holden, Collector*, (decided November 21, 1927, 48 Sup. Ct. Reporter, 105), in which the Gift Tax Law embodied in Part 2 of Title III of the Revenue Act of 1924, was held uncon-

stitutional in so far as it attempted to reach gifts made prior to the passage of the act.

The interest to which respondent would be entitled under (B) (1) of this point, *i. e.*, on the basis that the protest was sufficient, is as follows:

On $1,131,075.86 from June 15, 1918 (the date of the payment of the tax), to October 11, 1923 (the date of the allowance of the refund)	$361,123.08
The Commissioner of Internal Revenue allowed interest on account of refund for this year in the sum of (Finding of Fact XVII, R. 35)	16,197.84
Underpayment of interest	$344,925.24

This small amount of interest paid respondent is due to the position of the Commissioner in attempting by his letter of January 18, 1924, to undo his prior allowance on October 11, 1923, of respondent's claim filed June 12, 1920, and by claiming further in that letter that respondent's claim filed September 20, 1920, which he had previously rejected in full, was allowed for $105,556.34, and that the balance of the refund, viz., $1,025,519.52, was attributable to points "not raised in claims." The action of the Commissioner in these respects is well shown in the table for the year 1917 appearing on p. 11 herein, columns 3 and 4.

The refund on "points not raised in claims" was asserted by the Commissioner to have been made under sections 250 and 252 of the Revenue Act of 1921. In this regard the court below said:

> No interest is provided under section 252, for the simple reason that the excess payment is im-

mediately refunded, and there is consequently no loss to the taxpayer. (R. 39)

Continuing and referring to respondent the court stated:

> Such a situation is in no sense analogous to the case of a taxpayer whose excess payment was retained by the Government for more than five years and was finally discovered in an investigation resulting from the filing of a formal claim for refund. *Ibid.*

Further it must be remembered there is not a scintilla of evidence in this case to support the basis of claim theory. Petitioner's brief makes no reference to section 252 of the Revenue Act of 1921.

In respect of (B) (2) under this Point, which pertains to the amount of interest to which respondent would be entitled if its protest be held insufficient, it need only be said it would be upon the amount paid for the year 1917, from six months after claim was filed to the date of the allowance of the claim. This is as follows:

On $1,131,075.86 from Dec. 12, 1920 (six months after claim of June 12, 1920, was filed), to October 11, 1923 (the date of the allowance of the claim)	$192,019.49
The Commissioner of Internal Revenue allowed interest on account of refund for this year in the sum of (Finding of Fact XVII, R. 35)	16,197.84
Underpayment of interest	$175,821.65

SUMMARY TABLE UNDER POINT II

YEAR 1916.

Interest due respondent	$18,306.22
Interest paid respondent	19,171.21
Overpayment of interest	$864.99

YEAR 1917.

(1) If protest be held sufficient:

Interest due respondent	$361,123.08
Interest paid respondent	16,197.84
Underpayment of interest	$344,925.24

(2) If protest be held insufficient:

Interest due respondent	$192,019.49
Interest paid respondent	16,197.84
Underpayment of interest	$175,821.65

In respect of (1) and (2) above showing underpayments of interest to respondent there should be credited the overpayment to respondent of $864.99 for the year 1916. The net amounts, therefore, of interest to which respondent would be entitled under (1) and (2), respectively, of Point II hereof are as follows:

Under (1), $344,925.24 less $864.99, or $344,060.25
Under (2), $175,821.65 less $864.99, or $174,956.66

CONCLUSION.

It is respectfully submitted it is shown by Point I that the provisions of section 1019 of the Revenue Act of 1924 are applicable and hence the judgment of the court below in the amount of $365,799.42 should be

affirmed. Further, that if it be held that section 1324(a) of the Revenue Act of 1921 applies, respondent is entitled under Point II, if the protest be held sufficient, to additional interest in the net amount of $344,060.25 and, if the protest be held insufficient, to additional interest in the net amount of $174,956.66.

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Dated December 27, 1927.

FILED
MAR 13 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 283—October Term, 1927.

The United States of America, *Petitioner*,

vs.

Magnolia Petroleum Company, et al.

On Writ of Certiorari to Court of Claims.

MOTION TO MODIFY OPINION.

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Dated March 13, 1928.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

No. 283—October Term, 1927.

The United States of America, *Petitioner*,

vs.

Magnolia Petroleum Company, et al.

On Writ of Certiorari to Court of Claims.

MOTION TO MODIFY OPINION.

The only point raised in this motion relates to the seeming inconsistency in the opinion rendered on February 20, 1928, in respect of facts found by the court below and averments not established.

In its opinion (bottom of page 3) the court said in respect of the year 1917:

> October 8, 1923, the Commissioner wrote respondent that its claim first filed would be allowed for $1,131,075.86 and that the one last filed would be rejected in full. January 18, 1924, the Commissioner wrote respondent concerning the

> interest allowance stating that no part of the claim first filed had been allowed; that $105,556.84 had been allowed on the basis of the claim last filed and that $1,025,519.52 of the refund was "attributable to points not raised in the claim."

The concluding sentence of the opinion refers to the above as "ambiguous findings." The court below found that these letters had been written (Finding IX, R. 27 and Finding XIII, R. 30). They formed a part of the history of the case. The court did not find the averments in the letters to be facts. With the entire evidence in the case before it the court below made Finding X (R. 28), which is not mentioned in the opinion, and which is as follows:

> The Commissioner of Internal Revenue upon facts duly furnished him by plaintiff with its refund claims, or separately, and upon facts agreed upon, allowed plaintiff's refund claims on October 11, 1923, as follows:
>
> Year 1916, claim filed September 20, 1920, for $114,565.44, allowed for $105,571.95.
>
> Year 1917, claim filed June 12, 1920, for $1,966,600.87, allowed for $1,131,075.86.

The above is a positive affirmative finding of fact—a finding which it was the duty of the court below to make. It is one in which the court found the averments in the Commissioner's letter of October 8, 1923 (Finding IX, R. 27), written three days prior to the formal allowance of the claims, were established and not those contained in the letter of January 18, 1924, embodied in Finding XIII, R. 30, written more than three months after the allowance of the claims. The

letter of October 8, 1923, merely said the claims *would be* allowed in the amounts stated. Finding X (R. 28) establishes the claims were allowed in those amounts and that such allowances were made on October 11, 1923. Further, Finding X is fortified by Findings XI and XII (R. 28-29) which are the official certificates of overassessment showing the allowance of the amounts stated in Finding X. In each of these certificates of overassessment there appears this statement:

> This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the revenue act of 1921.

This court held the provisions of section 1324(a) of the Revenue Act of 1921[1] governed in respect of interest upon the refunds and that respondent's protest was insufficient; hence in order to ascertain the amount of interest to which respondent is entitled under that section respondent need only show the dates its claims were filed (interest began to run six months thereafter), the date of the allowance of the claims (interest ceased on that date) and the amount

[1]Section 1324(a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316: "That upon the allowance of a claim for the refund of * * * internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund * * * as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit * * *."

SUPREME COURT OF THE UNITED STATES.

No. 283.—October Term, 1927.

The United States of America, Petitioner, vs. Magnolia Petroleum Company, et al. } On Writ of Certiorari to the Court of Claims.

[February 20, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent was assessed and paid for 1916 an income tax of $105,571.95 and for 1917, income and excess profits taxes of $1,131,075.86 in excess of the amounts for which it was liable. October 11, 1923, the Commissioner of Internal Revenue so determined and, November 22, 1923, the respondent received certificates showing such overassessments and Treasury warrants for the return of these amounts. Each certificate included a statement that "interest status will be determined as soon as necessary data can be assembled."

Section 1324(a) of the Revenue Act of 1921, which was then in force, authorized interest from the date of the payment of the taxes if paid under protest; but, if not paid under protest or pursuant to an additional assessment, it allowed interest to commence six months after the filing of claim for refund. Section 1019 of the Revenue Act of 1924, provided that interest on refunds should be computed from the date the taxes were paid.[1]

January 18, 1924, the Commissioner notified respondent that the interest payable on the refunds had been determined. July 2, 1924,

[1]Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316: "That upon the allowance of a claim for the refund of . . internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund . . as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid

after the passage of the Revenue Act of that year, the Commissioner wrote respondent that the amounts stated in his letter of January 18, 1924,—corrected by reason of an error as to the date of filing the claim for refund of 1917 taxes—would be paid, and on July 18, 1924, issued a Treasury warrant to respondent for $35,369.05, being $19,171.21 on the refund of 1916 taxes and $16,197.84 on the refund of 1917 taxes. Respondent, saving its right to sue for additional interest, accepted payment of the amount specified, and later brought this suit. The Court of Claims held that the Act of 1924 applied, calculated interest from dates of payment of the taxes, and gave judgment for $365,799.42. This Court granted a writ of certiorari. 275 U. S. —.

The petitioner maintains that the interest should be computed according to § 1324(a) of the Act of 1921. Respondent contends that by § 1019 of the Act of 1924 and contemporaneous repeal of § 1324(a), the basis of interest allowances was changed and that, as the interest had not yet been paid, respondent became entitled to an amount calculated according to the later enactment. Undoubtedly it was within the power of Congress to apply that basis to claims like those of respondent. But the question is whether the statute should be so construed. The date of "allowance" was October 11, 1923, when the Commissioner approved the refunds. *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169. Under § 1324(a), "upon the allowance" of the refunds, respondent became entitled to interest according to the rule then in force. Cf. *Blair* v. *Birkenstock*, 271 U. S. 348, 350. Computation and payment were all that remained to be done. There is nothing to suggest that § 1019 was intended to change the rule as to refunds theretofore allowed. The language employed shows the contrary. The words are "upon the allowance of . . a refund . . interest shall be allowed . . from the date such tax . . was paid." Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with

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pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit . . ."

Section 1019 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 346 (U. S. C., Tit. 26, § 153): "Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, . . interest shall be allowed and paid on the amount of such credit or refund . . from the date such tax . . was paid to the date of the allowance of the refund . . ."

earlier provisions unless the legislative purpose so to do plainly appears. *United States* v. *Heth*, 3 Cranch 399, 413; *White* v. *United States*, 191 U. S. 545, 552; *Shwab* v. *Doyle*, 258 U. S. 529, 534. Respondent calls attention to § 1100 of the Act of 1924 repealing the Act of 1921 and says that the saving clause therein does not extend to interest on refunds allowed under § 1324(a). But, save as given by Congress, respondent had no right to interest; as shown above, the basis prescribed by the later Act was not substituted for that fixed by the earlier one; and, as respondent's right to have the rule prescribed by the Act of 1921 applied is not questioned, we need not consider the effect of the repealing and saving clauses. It is clear that respondent is not entitled to allowances on the basis of the Act of 1924, and that the judgment must be reversed.

Respondent, assuming that the Act of 1921 applies, insists that the facts found by the lower court show that the Commissioner's allowances of interest were erroneous and that it is entitled to much more than it has received.

It appears from calculations made in its brief that if the basis contended for by the respondent be applied to the refund of the 1916 tax, respondent has been allowed and paid $864.99 in excess of what it was entitled to have. As petitioner is not complaining of that, we need not consider the matter.

As to the 1917 taxes, respondent filed returns May 18, 1918, but paid no tax thereon. May 27 following, it filed amended returns showing taxes of $1,966,600.87, and, on June 15, paid that amount under protest. Petitioner contends that the protest was not sufficient under § 1324(a) to support a claim for interest from the date of payment. On June 12, 1920, respondent filed a claim for the full amount paid; and, September 20, 1920, filed claim for $1,005,519.42. October 8, 1923, the Commissioner wrote respondent that its claim first filed would be allowed for $1,131,075.86 and that the one last filed would be rejected in full. January 18, 1924, the Commissioner wrote respondent concerning the interest allowance stating that no part of the claim first filed had been allowed; that $105,556.84 had been allowed on the basis of the claim last filed and that $1,025,519.52 of the refund was "attributable to points not raised in the claim." The interest paid was calculated on the amount said to have been allowed on the latest claim for the period commencing March 20, 1921—six months

after the filing of that claim—and ending October 11, 1923, the date of the allowance.

If the protest was sufficient under § 1324(a), interest should have been calculated on the amount of the refund from the date of the payment of the taxes. The lower court held it valid. In order to meet the condition specified in § 1324(a), the payment must be made "under a specific protest setting forth in detail the basis of and reasons for such protest". The findings set forth its language. The grounds asserted were that the taxing Acts were ambiguous, uncertain and unconstitutional; that they did not apply to respondent; that the regulations prescribed under them were not authorized, and that the method prescribed for applying the rates under the War Excess Profits Tax Act was arbitrary and unjust. It was not found that any part of the refund was allowed on any ground or for any reason specified in the protest. It requires no discussion to show that these general statements were not sufficient to constitute a basis for the allowance of interest from the date of the payment of the taxes. The protest gave no information and stated nothing that would aid in determining whether an overassessment had been made. It was not sufficient. *Girard Trust Co.* v. *United States*, *supra*, 172.

Assuming the protest inadequate, respondent insists that it is entitled to interest on the full amount of the refund from six months after the filing of its first claim. But, as the merits of that contention depend upon ambiguous findings above referred to, the lower court should again consider the case and make definite determination of the controlling facts and give judgment thereon.

The judgment is reversed and the case is remanded for further proceedings in harmony with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

of the allowances, each of which it is obvious Finding X has established.

Respondent submits that this court should direct the court below to enter judgment for respondent for $174,956.66 which as shown on page 47 of respondent's brief is the amount to which respondent is entitled under section 1324(a) of the Revenue Act of 1921, every fact required under that section being established by Finding X, *supra*.

If this case be remanded for further findings it would put respondent in the position of being compelled to produce evidence, solely in the possession of petitioner, to overthrow averments in a letter which petitioner has heretofore had ample opportunity of establishing and which have already been found to the contrary by Finding X.

Copy of this motion has been duly served upon counsel for petitioner.

Respectfully submitted,

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Dated March 13, 1928.